89-1608

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

E. STANTON MAXEY, M.D.,

Petitioner

v.

DAN G. KADROVACH, DAVID K. McAFEE, M.D. AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition for certiorari presents the following questions for review to the Supreme Court of the United States:

1. Whether the Veteran's Administration's termination of the petitioner's employment was, as reflected in the administrative record, unlawful and should be set aside.

2. Whether the refusal to allow discovery and supplementation of the administrative record by evidence outside of the record was proper.

3. Whether the petitioner, as a Veteran's Administration probationary physician, has a right to assert constitutional tort claims against fellow employees arising from the employment relationship and the counts of constitutional torts against Dr. McAfee and Mr. Kadrovach were improperly dismissed.

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REFERENCE TO REPORTS BELOW

1. Petitioner filed this suit on March 15, 1988, in the United States District Court, Western District of Arkansas, Fayetteville Division, to redress his wrongful termination as a Veteran's Administration (V.A.) surgeon. Five counts were asserted. Four counts sought relief against the United States of America and two employees of the V.A., individually, for the constitutional torts of infringement of free speech and violations of due process. The fifth count sought relief under the Administrative Procedures Act, 5 U.S.C. §§701, et seq. The district court on October 12, 1988, dismissed the first four counts alleging constitutional torts. *Maxey v. Kadrovach*, 696 F.Supp. 425 (W.D. Ark. 1988). By its unreported opinion rendered on May 11, 1989, the district court denied the petitioner's request to perform pretrial discovery and to present evidence supplemental to the administrative record, and the district court rendered its final judgment, dismissing with prejudice the petitioner's final remaining count.

2. The petitioner appealed to the United States Court of Appeals for the Eighth Circuit. On November 20, 1989, the Eighth Circuit Court of Appeals affirmed. *Maxey v. Kadrovach*, 890 F.2d 73 (8th Cir. 1989).

3. A petition for rehearing was summarily denied by the Eighth Circuit Court of Appeals in an unreported

decision dated January 12, 1990.

STATEMENT OF GROUNDS OF JURISDICTION

This Court has jurisdiction under the provisions of 28 U.S.C. §1254 and Rule 10 of the Rules of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment 1 (App. 187)
2. United States Constitution, Amendment 5 (App. 187
3. 5 U.S.C. §706 (App. 188)
4. 38 U.S.C. §4110 (App. 189)

STATEMENT OF THE CASE

Dr. Maxey was first hired by the V.A. as a staff surgeon effective October 26, 1986, at the Big Spring, Texas, V.A. Medical Center (App. p. 50). In August 1987, Dr. Maxey transferred to the Fayetteville, Arkansas, V.A. Medical Center and was granted temporary clinical privileges in general surgery on August 6, 1987 (App. pp. 61-63). By memorandum dated

August 10, 1987, the V.A. instructed Dr. Maxey to request surgical privileges in "*all* areas" that he desired to practice (emphasis in original) (App. p. 63). Upon his request, such privileges, limited to certain surgical fields, were granted effective September 15, 1987 (App. pp. 63-72).

On September 24, 1987, the Fayetteville Medical Center adopted its "Bylaws, Rules and Regulations of Medical Staff." ("Bylaws") (App. p. 73-97). They were applicable to Dr. Maxey as well as all other staff physicians (App. p. 73); promoted medical care "of the highest quality" (App p. 74); and required ethical behavior (App. p. 76, 78).

For patient care, the Bylaws divided the medical staff into nine services including a "Medical Service" and a distinct "Surgical Service" and provided for assignment of physicians to services based upon carefully documented and reviewed professional qualifications (App. pp. 79-80) to assure "highest quality of treatment" (App. p. 81). Patients were assigned to the "service . . . concerned in the treatment of the disease process which is identified" (App. p. 90). Temporary staff privileges were not routinely granted, but:

> [I]n an emergency where a suitably qualified professional staff member is not available, the . . . Director may call upon an available specialist for assistance in meeting the clinical

> situation and grant temporary staff privileges *for such emergency purposes"* (App. p. 77, emphasis added).

The only non-surgical duties initially assigned Dr. Maxey were per the Medical Officer of the Day ("MOD") regulations. V.A. regulations state that "[o]ne or more *physicians* will be scheduled and assigned to provide medical supervision during evenings, nights, weekends and holidays when the regular medical staff is not on duty" (App. p. 98, emphasis in original). Local regulations implementing this provided that MOD duties terminated at the end of each 24-hour shift (App. p. 104).

From October 26 to December 11, 1987, the Chief, Medical Service, Fayetteville V.A. Medical Center, Dr. John Bergstrom, was absent, causing an increased workload for the remaining Medical Service physicians. (App. pp. 108, 114). Prior to his departure, Dr. Bergstrom personally developed the plan to alleviate the increased workload caused by his absence. That plan used Surgical Service personnel as "primary physician" for the Medical Service patients (App. p. 114). It was implemented on November 16, 1987, by a memorandum from defendant, Dr. David K. McAfee, Chief, Surgical Service, noting that certain *medical* patients admitted to the *medical* ward would become the *primary responsibility* of the *Surgical Service* and that the *Surgical Service*

physician assigned to each patient would have the *primary responsibility* for such patients (App. p. 114). Emphasis has been added because assignment of *primary patient responsibility* to surgeons for Medical Service patients (as opposed to assigning merely "care" or "treatment" responsibilities) triggered the dispute leading to Dr. Maxey's dismissal. At a surgical staff meeting the day this memorandum was issued, Dr. Maxey questioned the propriety of the assignment of "primary responsibility" and was answered by Dr. Brannon, the acting Chief, Surgery Service, "any time there was a problem with responsibility he felt sure it could be delegated" (App. p. 119).

On November 17, Dr. Maxey made written request for exemption from the assignment of Medical Service duty until an opinion could be obtained from the V.A.'s own counsel and the American College of Surgeons (App. p. 120). Dr. Maxey's request evoked a November 19 response from the acting Chief of Staff through the Chief, Surgical Service (Dr. McAfee), that Dr. Maxey would be "responsible for medical patients admitted to Ward 3B-Medicine" (App. p. 122). On November 20, a second memo was received by Dr. Maxey from Dr. McAfee as Chief, Surgical Service, indicating that both Dr. McAfee and the "district counsel" considered Dr. Maxey's reasons for not complying with the directive not valid and directing Dr. Maxey to resolve the matter by November 23 (App. p. 123). On November 23, Dr. Maxey received the written

opinion of his lawyer that, while Dr. Maxey may be exempted from malpractice liability by the Federal Tort Claims Act, the ethics and morality of his assuming such responsibilities remained in question. Copies of the letter went to the V.A. district counsel, as well as Dr. Maxey's congressional representatives (App. pp. 125). On November 27, the V.A. district counsel forwarded the letter to the Director of the Fayetteville V.A. Medical Center, defendant Mr. Kadrovach, noting it was Mr. Kadrovach's decision as to whether and how responses should be made to Dr. Maxey's lawyer and congressional representatives (App. p. 126).

The V.A.'s response came on November 30, 1987, when Dr. McAfee verbally counseled Dr. Maxey. In the counseling, Dr. Maxey requested that patients for which he was *responsible* be transferred to the Surgical Service or that the wording of the directive ("primary responsibility" being at issue) be changed; Dr. McAfee reiterated his intent to stand by the directive to keep medical patients on the Medical Service and characterized Dr. Maxey's position as insubordination (App. p. 127). On December 1, 1987, Dr. McAfee issued Dr. Maxey a written "intent to reprimand," citing Dr. Maxey's refusal to assume, responsibility for medical patients as the reason. He was allowed until December 8, 1987, to respond (App. p. 128), and he responded on December 7, noting among other concerns the general applicability of the ethics and quality provisions of the V.A. Bylaws and the specific limitations imposed by both

his own competence and his permitted clinical privileges (App. pp. 129-132).

A letter of reprimand dated December 10, 1987, was prepared over the signature of Mr. Kadrovach, noting that Dr. Maxey's response had been considered reprimanding Dr. Maxey for failing to assume the assigned responsibility for Medical Service patients. (App. p. 132). By regulation, reprimands are issued "to correct an employee for a violation . . . which is not serious enough to justify separation from the service" (App. p. 150). The letter of reprimand was delivered to Dr. Maxey on December 13, 1987 (App. pp. 152, 153), at which time he requested, in writing, an interview with Mr. Kadrovach to seek a resolution "which serves our mutual interests, our veterans and this facility without such dishonor" (App. p. 153).

After the December 13 delivery of the reprimand, the administrative record refers to a sole act by Dr. Maxey which may have violated the memorandum: On December 14, he sought a consultation from dermatology on a case of crabs infestation (App. p. 154); Dr. McAfee denied the consult (App. p. 154).

Also on December 14, Dr. Bergstrom had returned (App. p. 9), and due to Dr. Maxey's stance and the illness of another staff surgeon, the memorandum was rescinded (App. p. 10-2). The record reflects no

answer by Mr. Kadrovach to Dr. Maxey's letter requesting a resolution. Dr. Maxey received a notice dated December 15 that a probationary summary review of his appointment as a V.A. physician would be conducted by the Physicians Professional Standards Board, on December 30, 1987 (App. pp. 155-158).

At that time, the Physicians Professional Standards Board was comprised, pursuant to a Medical Center memorandum dated May 22, 1987, of the Chief of Staff as Chairman; Chief, Surgical Service (alternate being Assistant Chief); Chief, Laboratory Service; and Chief, Medical Service (alternate being Assistant Chief) (App. p. 159). However, the prescribed standing Board was replaced on December 16 by an *ad hoc* Board, appointed by Dr. McAfee, and approved by Mr. Kadrovach. Dr. Bergstrom, who by his absence and proposal to alleviate workload resulting from such absence was directly responsible for the contested memorandum, was appointed *ad hoc* chair. (App. pp. 161, 162). Dr. McAfee disqualified himself, but did not replace himself with his Assistant Chief, Dr. Brannon, per the standing memorandum of May 22, 1987 (App. p. 159), but with a Dr. Gocio from the Little Rock, Arkansas, V.A. Medical Center. The Chief, Laboratory Service, did not serve, but rather Dr. Bratton, a psychiatrist. Dr. Bergstrom, now chairing, was not replaced as required with his Assistant Chief, but rather with another Medical Service doctor, Dr. Daut (App. pp. 161, 162). The only reason that appears in the record for

the wholesale *ad hoc* dismantling and reincorporation of the standing Board is the statement of Dr. McAfee regarding "circumstances . . . and the involvement of several members of the [standing] Board" (App. p. 161).

On December 29, at 5:27 p.m. the evening before the Board hearing, Dr. Maxey was notified that the notice of his summary review delivered to him on December 16 (App. p. 175) was incorrect, in that the findings of the Board convening on the following morn would be final, rather than recommendatory to a final approving authority (App. pp. 175, 176).

The Physicians Professional Standards Board met on December 30, 1987 (App. pp. 162-169). All evidence reviewed, except the crabs referral of December 14, dealt with incidents occurring prior to Dr. Maxey's receipt of the letter of reprimand on December 13 (App. pp. 176-180). The Board also heard testimony from Dr. McAfee, which was erroneous in material part:

> After formal reprimand . . . Dr. Maxey entered an order on a patient's record to transfer the patient to Medical Service as 'Dr. Maxey does not assume responsibility for Medical Service patients' (App. pp. 164-165).

That record of transfer referred to by Dr. McAfee was actually dated December 12 (App. p. 181), and Dr. Maxey did not receive the reprimand until December 13,

1987 (App. pp. 152, 153). The record is devoid of any evidence that an "emergency," as contemplated in the Bylaws to necessitate doctors serving outside of their service, existed, or that a conflict with the Bylaws was even considered.

The Board found that Dr. Maxey was "not fully qualified and satisfactory as a V.A. physician" and recommended separation (App. p. 163). Dr. Maxey was notified of his separation on January 7, 1988, effective January 15, 1988 (App. p. 183).

Dr. Maxey sued Mr. Kadrovach, Dr. McAfee and the United States of America pursuant to 8 U.S.C. §1331 seeking as redress for wrongful, involuntary termination as a V.A. surgeon reinstatement, expungement of adverse records and front and back pay.

Upon the Government's motion to dismiss all counts, the district court in its opinion of October 12, 1988, dismissed the four counts alleging constitutional tort. Subsequently, an administrative record was stipulated and filed. By its opinion rendered May 11, 1989, the district court refused to allow either pretrial discovery by Dr. Maxey or the presentation of any evidence supplemental to the administrative record. Without providing Dr. Maxey any chance to brief his case, the district court's opinion dismissed with prejudice Dr. Maxey's remaining count. On November 20, 1989, the Eighth Circuit Court of Appeals affirmed, (App. pp.

1-9). and on January 12, 1990, summarily denied petition for rehearing.(App. p. 49).

REASONS FOR GRANTING THE WRIT

I. THE VETERAN'S ADMINISTRATION'S TERMINATION OF THE PETITIONER'S EMPLOYMENT WAS, AS REFLECTED IN THE ADMINISTRATIVE RECORD, UNLAWFUL AND SHOULD BE SET ASIDE.

5 U.S.C. §706, which provides that the court shall: . . . [H]old unlawful and set aside agency action, findings and conclusions found to be—(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (C) . . . Short of statutory rights; (D) Without observance of procedure required by law.

Both the substance of the V.A.'s decision and the procedures are fatally flawed, and neither of the courts below fully addressed or resolved the following:

1. Unlawfulness of the Memorandum of November 16, 1987. The V.A.'s action in referring Dr. Maxey to a board as a result of his response to the November 16 memorandum can hardly be characterized as anything other than "arbitrary and capricious." The V.A. had adopted the Bylaws limiting Dr. Maxey's primary responsibilities to surgery and setting the procedures by which patients were carefully admitted,

diagnosed and assigned to either Surgical Service, Medical Service or other Services to obtain the highest quality treatment. Despite the Bylaws, the V.A.insisted through the November 16 memorandum that certain patients, acknowledged to be properly assigned for Medical Service, nevertheless be put under the primary responsibility of a surgeon; and then deemed, by its use of a reprimand, Dr. Maxey's course of action in response to these conflicting orders, "not serious enough to justify separation from the service," yet promptly dismissed him.

The Board and courts below completely ignored specific provisions of the Bylaws directing:

> Delineation of clinical privileges will be documented for all professional personnel involved in direct patient care to assure the highest quality of treatment at this health care facility. . . . Assignment of the professional staff depends upon the individual's professional qualifications. . . . The professional services in the Medical Center under the Chief of Staff consist of: Medical Service, Surgical Service . . . [and] temporary staff privileges will not be routinely granted. However, in an emergency where a suitably qualified professional staff member is not available, the Medical Center Director may call upon an available specialist for assistance in meeting the clinical situation and grant

> temporary staff privileges for such emergency purposes. (App. pp. 79-81)

Neither the Board nor the courts below looked for or found the requisite "emergency" necessary for a Surgical Service physician to treat patients assigned to the Medical Service under the specific Bylaw that provides "all patients . . . shall be assigned to the service or section concerned in the treatment of the disease process which is identified" (App. p. 90).

While the circuit court noted Dr. Maxey's right to request consultative assistance, it failed to realize that it was a single such request (a consult to dermatology for crabs) that triggered his appearance before the disciplinary board. Even if an emergency had been found to exist, the V.A. Bylaws contemplate a "specialist" from outside the staff (hence the necessity of "temporary staff privileges") rather than the abuse of an existing staff surgeon being assigned as an unqualified fill-in on the Medical Service.

The crux of this particular issue is that the V.A. issued Dr. Maxey irresolvably conflicting orders. The memorandum was unlawful because it was directly in conflict with the specific provision of the Bylaws, placing Dr. Maxey in a dilemma which, depending on his response, put him in direct violation of either the Bylaws or the memorandum. Termination under these circumstances is, indeed, unlawful by virtue of being all

of "arbitrary, capricious, an abuse of discretion and without observance of procedures required by law."

2. Notice of the Board Hearings, as Required by V.A. Regulations Implementing Applicable Law, Was Not Given to Dr. Maxey. DM&S Supplement MP-5, Part 2 (App. pp. 134-152) is the V.A. regulation implementing 38 U.S.C. §4106(b), pertaining to probationary V.A. physicians. 4.06(b) of that Supplement dictates that the board hearing notice provided to an employee will be:

> . . . in writing . . . and as a minimum contain the following: . . . explanation that the purpose of the board is to conduct an impartial review of his services and to make recommendations to the Chief Medical Director or field station head, as appropriate, whose decision is final.

The notice contained this language: "The purpose of the Board is to conduct an impartial review and make recommendations to the appropriate approving authority whose decision is final." (App. p. 155)

Dr. Maxey was not correctly notified until 5:27 p.m. the day before the hearing.

Notice being required by the regulation, it is fair to impute reasonable final notice; and if the final effect of the Board hearing is a necessary part of that notice, it is urged that it was contrary to the regulation,

arbitrary and capricious to incorrectly notify Dr. Maxey of the legal effect of the Board's determination up until the night before the Board was actually to convene. To advise a petitioner on the eve of hearing that previously stated and relied upon rights of appeal have been extinguished is arbitrary, and the court below improperly presumes too much by assuming that this drastic change in procedure had no effect on Dr. Maxey's response.

3. The Prejudice of the Board Chairman, Dr. Bergstrom, Against Dr. Maxey Was Contrary to Regulation Implementing Statute. The regulation implementing the statutory probationary review requires that "persons in a position to prejudice the action of the board may not serve as members of the board conducting the review." (App. p. 147 §4.06[c][9]). As noted in detail above, the memorandum of November 16, obviously in conflict with the Bylaws, required a careful and unprejudiced evaluation of the facts in light of that conflict. Dr. McAfee properly disqualified himself, but personally chose all of the members of the *ad hoc* Board. Two other doctors, who per the standing order should have served, being the Chief of Staff and Chief, Laboratory Service, did not serve (App. p. 159). The record is silent of any mention of their names or any particular circumstances which dictated their removal from the Board. Obviously prejudicial is the fact that Dr. Bergstrom not only remained on the Board but served as its Chairman. This is the same Dr. Bergstrom who was Chief, Medical Service, whose absence necessitated the

contested memorandum (App. pp. 113, 114), and whose particular idea it was that surgeons provide the resources to alleviate the increased workload in the Medical Service resulting from his absence! (App. p. 113)

The Eighth Circuit cited two cases for its conclusion that Dr. Bergstrom was not prejudiced, neither of which bear significant factual relevance. Those cases do lead to relevant precedent demonstrating that the prejudice here was so material as to disqualify the proceedings. The circuit court cited *Gilbert v. Johnson*, 419 F.Supp. 859 (N.D. Ga. 1976), *aff'd in relevant part*, 601 F.2d 761 (5th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980), where the plaintiff V.A. physician, Dr. Gilbert, challenged the actions of a Dr. Musser, who had been directly involved in adverse administrative actions against Dr. Gilbert, in appointing Dr. Gilbert's board. The Court found:

> Plaintiff has not shown or even alleged exertion of pressure or influence on the board members. . . . Absent any specific allegations of misconduct, bias or prejudice by the board members in this case *(there is none alleged)*, the Court rules that the appointment of these board members by . . . Musser complied with the V.A.'s regulations. (419 F.Supp. 859 at 871, emphasis supplied)

In *Klinge v. Lutheran Charities Ass'n.*, 523

F.2d 56 (8th Cir. 1975), the discharged physician, Dr. Klinge, argued that the board appointed in his case, comprised of staff physicians from his hospital, had prejudged his case (supra, p. 62). The only allegations of prejudice were a general familiarity with the case. The Court found:

> . . . Administrative fact finders are not necessarily disqualified from participating in an adversary proceeding simply because they have been exposed to evidence present in non-adversary investigative procedures that were filed prior to the adversary hearing.

The *Klinge* court found that the plaintiff's arguments about the hearing panel were not dissimilar to the arguments advanced in another case, *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974). A review of that case shows that it, too, is inapposite to the facts in Dr. Maxey's case.

In *Duffield*, the plaintiff doctor actually performed a very thorough voir dire on the committee, stating for the record that he had "no reason to suspect that any one of you would do anything other than fair and impartial" (at p. 516). The doctor unsuccessfully urged on appeal that due process "proscribe[s] completely any exposure on the part of the tribunal or its members to the factual issues of the proceeding prior to final decision" (at p. 517), an argument Dr. Maxey does

not make.

However, in considering Dr. Duffield's argument, the court noted a case that factually *is* relevant to Dr. Maxey's situation, *American Cyanamid Co. v. F.T.C.*, 363 F.2d 757 (6th Cir. 1966). That case is distinguished in the *Duffield* case because the *American Cyanamid* case involved a hearing commissioner who, prior to the time the case was under consideration, had participated as counsel for a congressional committee which gave him particular views and opinions as a result of this "extrajudicial source," unconnected with his "participation in the case and who *"had expressed a firm opinion on the issues during those 'extrajudicial' proceedings" (Duffield,* at p. 518, emphasis supplied). Dr. Bergstrom personally and materially participated in the issuance of the contested memorandum, before it was ever contested and before he was appointed to chair the board to decide its validity. As was the hearing commissioner in the *American Cyanamid* case, Dr. Bergstrom's participation in that memorandum itself "expressed a firm opinion" on its validity, an unavoidable "prejudgment."

In none of these cases were *any* allegations of specific prejudice made, except the *American Cyanamid* case; and in that case, the administrative board *was* determined to be prejudiced.

It is quite clear that Dr. Bergstrom was

already "prejudiced," that the arrangement was a legal one: It had been designed by him, for his benefit and implemented at his request. As Board Chairman, he was, contrary to the applicable regulations, unquestionably a "person in a position to prejudice the action of the board," and a board so composed is not only "without observance of procedure required by law" but also "an abuse of discretion" (5 U.S.C. §706(2)(A) and (D)).

II. THE REFUSAL TO ALLOW DISCOVERY AND SUPPLEMENTATION OF THE ADMINISTRATIVE RECORD BY EVIDENCE OUTSIDE OF THE RECORD WAS IMPROPER.

Dr. Maxey's request to pursue discovery and evidentiarily supplement the record was denied. (App. B2, A7) It is the well settled general rule that the court is limited to deciding an appeal under the Administrative Procedure Act on the administrative record. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275 (D.C. Cir. 1981).

However, *Corning Savings & Loan Association v. Federal Home Loan Bank*, 736 F.2d 479 (8th Cir. 1984), also recognizes a well established exception to the general rule. If the aggrieved party can make a "strong showing of bad faith or improper behavior," *Corning* at 481, then the record can be evidentiarily supplemented. A slightly different variation of the rule was stated in *General Research Corporation v.*

United States, 541 F.Supp. 442, 446 (E.D. Va. 1982), that if "sufficient irregularities" are shown concerning bad faith, then the court is allowed to receive evidence outside the administrative record. A party seeking discovery must show specific facts to indicate that the challenged action was reached because of improper motives; more than bald assertions of bad faith are necessary to so proceed. *Friends of Shahwanguenks, Inc. v. Watt*, 937 F.R.D. 663, 667-668 (D.C. N.D.N.Y. 1983).

The district court interpreted this to find:

> To contend that "bad faith" played a role in an administrative decision is, in essence, to assert that even if there is sufficient objective support for the administrative decision, the objective evidence was not the true reason for the termination. (App. p. 12).

Somehow, the court worked the proper law conclusion into a conclusion that, regardless of any bad faith whatsoever, if the administrative decision was based upon any kind of objective evidence, even a "bad faith" showing would not entitle the plaintiff to pursue discovery and evidentiarily supplement the record (App. pp. 12). The Eighth Circuit summarily affirmed, concluding that the allegations of misconduct fell short of the required showing (App. p. 9).

If correct, this reasoning extinguishes the

"bad faith" exception. If a court accepts the administrative record on its face as being true and then finds from that administrative record that the decision was "sufficiently supported" (App. p. 13) when, in fact, the evidence presented in that administrative record may well be materially false, or the Board is improperly convened or the members are demonstrably prejudiced, the court has performed its judicial review of an administrative record built on procedural sand. The court, by treating the administrative record in isolation, precluded Dr. Maxey from demonstrating that the foundations under the administrative record are flawed.

Petitioner has the burden of demonstrating prima facie "bad faith," but having demonstrated that, he is entitled to draw back the curtains so that the light of additional evidence can illuminate the flaws in the administrative record. The matters already before the court contained sufficient evidence of "bad faith" to dictate that discovery and presentation of additional evidence should have been allowed to-wit:

Dr. McAfee's testimony to the Board that Dr. Maxey's reprimand occurred before his refusal to see a certain patient was materially false, as more fully discussed in the statement of the case. Dr. McAfee's false statements to the Board are prima facie evidence of "improper behavior," "bad faith" or "sufficient irregularities," and discovery would have shown, first, why Dr. McAfee made the misrepresentation and,

second, whether the Board members would have reached a different result had they realized that Dr. McAfee's statements were materially false.

A second indicia of "improper behavior" or "bad faith" was the manner in which the Board was formed by Dr. McAfee, who having disqualified himself yet put on the Board as Chairman Dr. Bergstrom, whose personal and professional interests in the outcome were inseparably interwoven with Dr. McAfee's actions. The Board, having been formed with a prejudiced Chairman, discovery would have developed additional, cogent evidence as to why the Board was so formed, and what effect this had on the presumably "correct" and "objective" results.

Next, the contested memorandum was directly in conflict with clear provisions of the Bylaws, defining distinct patient care services, assignment of patients and physicians among those services and the requirements of an "emergency" to contravene these dictates; but the Board's findings are mute of any consideration of the applicability of these Bylaws. Discovery would have shown whether the Board was *even aware* of the dictates of the Bylaws. Dr. Gocio was, in fact, not even a member of the Fayetteville V.A. medical staff and, presumably, was unaware of its Bylaws. When the Board visibly failed to even consider the Bylaws, its decision is impugned.

Finally, the notice which regulations required that Dr. Maxey receive was erroneous, and certain of the "minimum" information required in that notice was withheld from Dr. Maxey until the evening before the hearing. Again, this is "bad faith" and "irregularities" on the Government's part and discovery would have revealed why such urgency by the V.A. to stamp out "insubordination" rather than do a fair consideration of the propriety of its actions and Dr. Maxey's reactions.

The district court's denial of the requested discovery made a conclusive presumption of regularity and objectivity to the Board findings in the face of ample "bad faith" in the record which showed the court that it should consider additional evidence to determine whether the personnel and means by which those findings were rendered were themselves flawed.

III. A VETERAN'S ADMINISTRATION PROBATIONARY PHYSICIAN HAS A RIGHT TO ASSERT CONSTITUTIONAL TORTS AGAINST FELLOW EMPLOYEES ARISING FROM THE EMPLOYMENT RELATIONSHIP, AND THE COUNTS OF CONSTITUTIONAL TORT AGAINST DR. McAFEE AND MR. KADROVACH WERE IMPROPERLY DISMISSED.

The district court, in dismissing the constitutional counts, grappled with a morass of not easily reconciled decisions. However, starting with the

case of *Bush v. Lucas*, 462 U.S. 367 (1983), the Court found that a constitutional tort action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), would not be implied if Congress either (1) has developed a comprehensive remedial system for the redress of a plaintiff's grievances, or (2) if special factors exist which counsel against such an implication. The Court looked at the case of *Franks v. Nimmo*, 796 F.2d 1230 (10th Cir. 1986), which found that the remedies available to a probationary physician, though limited, were meaningful, being part of the "comprehensive remedial system."

The district court found support for the the "special factors" prong of the test in *Schweiker v. Chilicky*, 487 U.S. —, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), where the Supreme Court dismissed *Bivens* claims, holding that continuing review statutes were "a special factor" precluding a *Bivens* action, notwithstanding that the remedies were limited under those, and cited this from the *Chilicky* decision at U.S.L.W., p. 4770:

> When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Another case originally in support of Dr.

Maxey's *Bivens* actions, *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), was vacated by the Supreme Court at 101 L.Ed. 897, for reconsideration in light of *Chilicky*. Based upon this precedent, the courts below concluded that the remedies available to Dr. Maxey were meaningful and constitutionally adequate, even if not as extensive as those available to a nonprobationary employee; and that "congressional inaction has not been inadvertent," altogether constituting special factors counseling against the implication of a *Bivens* action. (App. p. 5).

In *McIntosh, et al. v. Turner*, 810 F.2d 1411 (8th Cir. 1987), rehearing at 861 F.2d 524 (8th Cir. 1988), in which the original Eighth Circuit opinion was favorable to Dr. Maxey, upon remand from the Supreme Court based upon the *Chilicky* decision, the circuit court held "only if Congress' omission to recognize a constitutional tort claim was inadvertent will the courts be free to allow such a claim in the case of federal employees."

In 1986, Congress passed the Health Care Quality Improvement Act, which was codified at 42 U.S.C. §§11101 through 11152. The Act aimed to remedy the increasing occurrence of medical malpractice by restricting the ability of incompetent physicians to move from state to state without discovery of their previous incompetence. The proposed remedy was effective professional peer review, but it was presumed that physicians were discouraged from participating in

effective peer review because of the threat to reviewing physicians of liability for damages arising from their reviewing activities. The law thus provides that physicians participating in professional review actions will not be liable for any damages, but only if certain standards of the statute are met.

The standards established are of a due process nature, to ensure than any professional review will not unfairly characterize a physician being reviewed; if met, then the reviewers are not liable for damages brought by a physician who was reviewed.

The due process standards are set forth primarily in §11112 and include a hearing, not less than 30 days' notice, lists of witnesses, an arbitrator mutually acceptable to the physician and the health care entity, hearing officers who are not in direct economic competition with the physician, right to representation by an attorney, right to call, examine and cross-examine witnesses and rights to present evidence determined to be relevant by the hearing officer.

In none of the cases relied upon below (*Chilicky*, *Kotarsky* or *McIntosh*, supra) was the involved employee a probationary employee of the Veteran's Administration or a physician. And, in none of those cases, would the characterization of the board action affected the future employability of such physician. Those cases are not on point. The Health Care Quality

Improvement Act clearly indicates that Congress contemplates that reviewing physicians *will and should* be subject to civil liability if the mandates of that Act are not met. With respect to Dr. Maxey, Congress is not guilty of an "omission to recognize a constitutional tort claim" as contemplated in *McIntosh*, supra; indeed, Congress has specifically recognized such tort liability by its concern, expressed in this Act, that its physician employees will be liable for such damages if they do not follow the constraints of the Act in the professional review process.

§11152 specifically requires that the Secretary of Health and Human Services shall seek to enter a memorandum of understanding with the Administrator of Veterans Affairs to apply the provisions of the title pertaining to reporting to hospitals and other facilities and health care providers under V.A. jurisdiction. This memorandum was to have been established not later than November 14, 1988. The import of this memorandum, of necessity, was to ensure that no reports would be made in the absence of the due process constraints provided in the Act.

Congress has recognized that the remedies VA probationary physician employees have, though limited, include the right to sue other employees of the V.A. who may negatively characterize their conduct and competence. Congress has developed certain procedures which the V.A. and its professional standards boards

should follow if they do not expect to be so sued. Those standards were obviously violated in this case. It is inappropriate for the courts, in light of this law and these facts to speculate upon what Congress' intent was regarding a *Bivens* action; Congress clearly expressed in this Act its interpretation of the law that Dr. Maxey is entitled to bring such an action, and the tests developed by the courts to otherwise construe congressional intent simply do not come into play here because Congress has clearly expressed that intent.

CONCLUSION

The United States District Court and the Circuit Court of Appeals in affirming the decision have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

For these reasons, a writ of certiorari should issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Appendix

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United States Court of Appeals
For the Eighth Circuit

No. 89-1973

E. Stanton Maxey, M. D.
Appellant

v.

Dan G. Kadrovach, David K. McAfee, M.D., and the Veterans Administration, an Agency of the United States of America,
Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: October 12, 1989
Filed: November 20, 1989

Before McMILLAN, JOHN R. GIBSON, and MAGILL, *Circuit Judges.*

PER CURIAM:

E. Stanton Maxey, M.D., appeals from the district court's[1] dismissal of his constitutional tort claims

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[1]The Honorable H. Franklin Waters, Chief Judge, United States District Court for the Western District of Arkansas.

and ruling in favor of defendants on his claim under the Administrative Procedure Act (APA), 5 U.S.C. §§701-706, arising from his discharge as a Veterans Administration (VA) physician. We affirm.

On October 26, 1986, Maxey was appointed as a staff surgeon at the VA Medical Center in Big Springs, Texas. He later transferred to a similar position at the VA facility in Fayetteville, Arkansas, where he was granted clinical privileges in general surgery.

On November 16, 1987, appellee David K. McAfee, chief of surgical services at the Fayetteville facility, issued a directive to all staff surgeons stating that, because of an excessive workload for the medical services department, physicians on the surgical staff would be temporarily assigned primary responsibility for the care of certain medical services patients. Maxey objected, arguing that the assignment would violate medical ethics and VA bylaws.

Maxey was subsequently advised in writing that his reasons for failing to comply were not valid. Maxey's counsel then drafted a legal opinion for Maxey which concluded that, although Maxey would face no malpractice liability by complying with McAfee's directive, the directive appeared to violate ethical standards. Copies of the opinion were sent to the VA district counsel as well as Maxey's congressman and senators. After being warned in writing by McAfee

regarding his refusal to accept medical services patients, Maxey was reprimanded for insubordination by appellee Dan G. Kadrovach, medical center administrator, when Maxey continued to refuse to accept medical services patients. Maxey then requested a conference with Kadrovach.

On December 15, 1987, Maxey was notified that a Physicians Professional Standards Board (Board) would be convened on December 30, 1987, to conduct a summary review of his probational appointment and make a recommendation to Kadrovach. Maxey declined to cancel a vacation to attend, but did obtain permission for a representative to appear on his behalf. On December 29, 1987, at 5:27 p.m., Maxey was notified that because of his probationary status, the determination of the Board would be final without review by Kadrovach. The Board met the following day, considered the evidence presented and determined that Maxey be terminated from his probationary status. Maxey's date of separation from the VA was January 15, 1988.

Maxey filed the instant suit against Kadrovach, McAfee, the VA and the United States, claiming that appellees violated his constitutional rights to free speech and due process (Counts I-IV) and terminated him from employment in an unlawful and arbitrary fashion (Count V). Maxey sought reinstatement, backpay, compensatory and punitive damages, restoration of benefits and expungement of derogatory

references in his personnel record.

Appellees' motion to dismiss Maxey's constitutional tort claims was granted by the district court, relying upon *Bush v. Lucas*, 462 U.S. 367 (1983), and its progeny. *Maxey v. Kadrovach*, 696 F.Supp. 425, 430-33 (W.D. Ark. 1988). Thereafter, the district court entered judgment on behalf of appellees on Maxey's remaining claim under the APA.

Maxey argues on appeal that (1) the termination procedure was unlawful because of the illegality of the November 16 memorandum, improper notice, and the presence on the Board of a prejudiced member; (2) the district court erred in not allowing further discovery to supplement the record; (3) he was entitled to the statutory termination procedures due a nonprobationary rather than a probationary physician; and (4) the district court erred in dismissing his constitutional tort claims.

If Congress has not explicitly created a direct action for constitutional violations by federal officials or employees, and if it has created other remedies to vindicate (though less completely) the particular rights asserted, a federal court will not recognize a constitutional tort claim unless Congress' omission was inadvertent. *McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988) (citing *Schweiker v. Chilicky*, 108 S.Ct. 2460, 2468 (1988)). A VA probationary physician who is

discharged in alleged violation of the Constitution may appeal that agency decision to a federal court under the APA to gain redress, albeit limited in nature. *Franks v. Nimmo*, 796 F.2d 1230, 1239-40 (10th Cir. 1986). Maxey thus has no right to pursue constitutional tort claims against his supervisors.[2] *See id.; McIntosh*, 861 F.2d at 526. Accordingly, the district court correctly dismissed Maxey's *Bivens*[3] claims.

In reviewing a district court's entry of judgment on an APA claim, an appellate court " 'must render an independent decision on the basis of the same administrative record as that before the district court.' " *Brown v. United States Dep't of Interior*, 679 F.2d 747, 748-49 (8th Cir. 1982) (quoting *First Nat'l Bank v. Smith*, 508 F.2d 1371, 1374 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975)). A reviewing court must set aside any agency action found to be arbitrary, capricious, an abuse of discretion, short of statutory right or without observance of procedure required by law. 5 U.S.C. §706.

We reject Maxey's contention that he was not a probationary employee and thus was entitled to

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[2]Contrary to Maxey's argument, the Health Care Quality Improvement Act, 42 U.S.C. §§11101-11152, is inapposite to his claims because it applies to the discharge of incompetent, not insubordinate, physicians. Even if the Act applied to the latter, it cannot be read to create a direct action for constitutional violations by members of the VA peer review board.

[3]Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

statutory termination procedures due a nonprobationary physician, despite an ambiguity of the personnel forms.[4] Title 38 U.S.C. §4106(b) "unequivocally requires" that physicians appointed under §4104 serve a two-year probationary period. *Franks*, 796 F.2d at 1235. Title 38 contains no authority for the VA to waive the probationary period; thus it had no discretion regarding whether to waive a "trial period." Maxey's treatment by the VA as a probationary physician was correct.

Maxey argues that his termination by the VA was unlawful because the memorandum directing surgeons to provide primary care to medical services patients violated VA bylaws. We disagree. Article III, section 6 of the bylaws states that in an emergency where a qualified professional staff member is not available, a specialist may be called upon for assistance and temporary staff privileges granted. If Maxey believed that he did not have the expertise to treat a particular medical services patient, he could have requested consultative assistance. Moreover, he had treated medical services patients when assigned Officer of the Day duty.

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[4]The appendix supplied to the court indicates that Maxey was initially hired by the VA Medical Center in Big Springs, Texas, as a staff surgeon in a "full time permanent, excepted" position, pursuant to 38 U.S.C. §4104(1). The appointment is noted to be subject to a two-year probationary period commencing "*00-00-00." A personnel notice to employees states that "[a] trial period may be required at the discretion of the employing office."

Maxey also argues that his termination was unlawful because he received inadequate notice. Specifically, he contends that the amended notice he received at 5:27 p.m. on December 29, 1987, informing him that the Board's decision was to be final instead of recommendatory, was not adequate because the hearing was scheduled for the following morning.

The VA's regulations require that probationary physicians be provided written notice of the Board's purpose in meeting. Department of Medicine and Surgery Supplement, MP-5, pt. II, ch. 4, §4.06(b). Here, despite the short notice given of the change in the Board's function, Maxey's ability to prepare for the hearing was not impaired. He had two weeks notice of the subject matter of the hearing, was waiting for an appointment with Kadrovach to discuss the same issues, had already retained legal counsel and had obtained a representative to appear on his behalf before the Board. Therefore, the notice to Maxey of the Board's revised purpose was not inadequate.

Maxey next argues that Board member Dr. John G. Bergstrom was not an impartial decisionmaker because he was appointed by McAfee and was also involved in the decision to have surgical services assist in alleviating the medical services workload. Maxey claims that Bergstrom's participation violated VA procedure.

"Persons in a position to prejudice the action

of the board may not serve as members of the board conducting the review." *Id.* §4.06(c)(9). However, allegations of misconduct, bias or prejudice by Board members must be specific, not general, in order to establish the denial of a neutral and detached tribunal. *Gilbert v. Johnson*, 419 F.Supp. 859, 871 (N.D. Ga. 1976), *aff'd in relevant part*, 601 F.2d 761 (5th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). The fact that McAfee appointed Board members is insufficient to establish bias. *See id.* Moreover, the fact that Bergstrom participated in the preparation of the November 16 memorandum did not disqualify him because there was no showing that Bergstrom had any "personal animus or ill will" towards Maxey. *Klinge v. Lutheran Charities Ass'n*, 523 F.2d 56, 63 (8th Cir. 1975).

Maxey's final argument is that the district court erred in refusing to allow discovery and supplementation of the administrative record. A federal court is confined to the administrative record in deciding an appeal under the APA, *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), unless the plaintiff can make a "strong showing of bad faith or improper behavior." *Corning Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 736 F.2d 479, 481 (8th Cir. 1984).

Maxey contends that he made a sufficient showing to overcome the general rule disallowing discovery by citing (1) the short notice provided him of

the Board's decisonmaking, not recommendatory, function; (2) the uncertainty as to whether one member of the Board had any knowledge of the VA bylaws; (3) the placement of Bergstrom on the Board as chairman by McAfee; and (4) McAfee's false testimony that the reprimand preceded Maxey's failure to treat a patient. We find that the evidence regarding these allegations of misconduct falls short of the strong showing of bad faith or improper behavior necessary to permit discovery and supplementation of the administrative record. With respect to Maxey's final allegation, the record does reflect that the reprimand was received by Maxey after, not before, he refused to treat a patient on December 12, 1987. However, even without this erroneous testimony, there is sufficient evidence on the record to find that the Board's action was rational and thus was neither arbitrary nor capricious. *See id.* at 480-81.

Accordingly, we affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

In the United States District Court
Western District of Arkansas
Fayetteville Division

E. Stanton Maxey, M.D. *Plaintiff*
v. Civ. No. 88-5034
The United States of America *Defendant*

JUDGMENT

On this 11th day of May, 1989, came on for consideration the above-entitled matter initiated pursuant to 5 U.S.C. §701 *et seq.* From review of the administrative record as supplemented by the parties, the court finds and concludes that defendant, United States of America, is entitled to judgment and that the complaint of the plaintiff, E. Stanton Maxey, M.D., should be and hereby is dismissed with prejudice for the reasons set forth in the court's memorandum opinion filed concurrently herewith.

IT IS SO ORDERED.

H. FRANKLIN WATERS
United States District Judge

In the United States District Court
Western District of Arkansas
Fayetteville Division

E. Stanton Maxey, M.D. *Plaintiff*
v. Civ. No. 88-5034
The United States of America *Defendant*

MEMORANDUM OPINION

The plaintiff's allegations giving rise to the instant claim are detailed in the court's memorandum opinion dated October 13, 1988, *Maxey v. Kadrovach*, 696 F.Supp. 425 (W.D. Ark. 1988), and will not be repeated herein except as pertinent to the court's discussion. Currently pending are plaintiff's motions to augment or supplement the administrative record. The United States does not object to the court's consideration of the documents to which plaintiff refers in his motions and those documents will, accordingly, be considered. To the extent that plaintiff seeks to further supplement the record and to conduct additional discovery, plaintiff's request will be denied.

Remaining in this action for consideration is Count V of plaintiff's complaint, as amended. Count V arises solely under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* Both parties acknowledge that the well-settled general rule is that the court is confined to the administrative record in deciding an appeal under

the Act. *See Arkla v. Texas Oil & Gas*, 734 F.2d 347 (8th Cir. 1984). As *Arkla* makes clear, there are certain well-defined exceptions to the general rule, none of which appear to have any applicability here.

Plaintiff suggests that the decision of the Veteran's Administration (VA) to terminate him was improperly made and implemented, and then followed by "kangaroo court" procedures to provide some "semblance of propriety." The court understands plaintiff to argue that the VA acted in bad faith, and that specific facts demonstrating this are, therefore, subject to discovery and consideration by the court.

The "bad faith" exception is extremely narrow, requiring a strong showing of improper behavior. *See Corning Sav. & Loan Assn. v. Fed. Home Loan Bank*, 736 F.2d 479 (8th Cir. 1984). Inquiry into the mental processes of administrative decision-makers is usually to be avoided. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The reason for this is self-evident. Under the APA the court is limited to determining whether agency action is arbitrary, capricious, an abuse of discretion, contrary to the constitution or statutory right, or violative of procedural due process. 5 U.S.C. §706(2). To contend that "bad faith" played a role in an administrative decision is, in essence, to assert that even if there is sufficient objective support for the administrative decision, the objective evidence was not the true reason for the termination.

Plaintiff has contended, from the outset, that he was terminated as a proximate result of his having engaged in constitutionally-protected conduct. It follows that if plaintiff was constitutionally entitled to engage in the conduct forming the basis of his termination, that conduct may not form the basis of a valid termination. If plaintiff was so entitled, then the sole question is whether the administrative decision is sufficiently supported by the record. Nowhere in this framework is there "room" for an assertion that a purported basis for plaintiff's termination was not, in fact, the "real" reason. As the court views the matter, the sole issue presented is whether the plaintiff was entitled to engage in the actions which formed the basis of his termination, and if such conduct is not constitutionally protected, whether the administrative decision is arbitrary, capricious or was an abuse of discretion.

The administrative record contains numerous documents. The dispute between plaintiff and the VA, as noted in the court's prior memorandum opinion, arose from plaintiff's belief that he was entitled to refuse to accept responsibility for "medical" patients and instead, would accept responsibility only for "surgical" patients.

Plaintiff, with or without advice from counsel, astutely attempted to "balloon" the controversy into one involving his first amendment rights of free speech. This claim involved letters written to various

governmental personnel, including a senator and a congressman, critical of the VA's policy at issue. However, even if a termination because of such conduct is actionable in some form (see this court's prior memorandum opinion), the court specifically finds absolutely no basis in the record for the contention that the letters motivated, even in part, the VA's employment decision at issue herein. The record shows that it was plaintiff's *conduct* (in refusing to treat patients) that the board found warranting of disciplinary measures, not plaintiff's *speech* in writing letters or speaking critically of the VA policy which prompted this confrontation.

The first document evidencing this conflict is a medical record dated December 12, 1987, wherein plaintiff wrote on a patient's chart, "Trans to med. or re-assign as Dr. Maxey does not accept responsibility for care of medical patients. E. Maxey." A "Report of Contact" executed by David McAfee on December 13, 1987, reflects that plaintiff was given a letter of reprimand for this conduct and his previously expressed intention to engage in this conduct. According to the report, plaintiff said he would fight it "to the end" and would continue to refuse to see medical patients.

Next included in the record is a document reflecting a change in the membership of the Professional Standards Board because of the involvement of several members of the board in plaintiff's actions.

The record reveals that on December 15, 1987, a letter was written to the plaintiff advising him that the board was scheduled to conduct a "summary review" of his probational appointment on December 30, 1987, at 9:30 a.m. This letter detailed the alleged deficiencies and summarized the facts leading to the review. These facts included that a November 16, 1987, memorandum from the Chief of the Surgical Service instructed the plaintiff to provide care and assume responsibility for medical service patients. Plaintiff, in a written statement dated November 17, 1987, and in conversation with the Chief of the Surgical Service, refused to follow this directive. Accordingly, a letter or reprimand dated December 10, 1987, was issued to the plaintiff.

The letter reiterated evidence to be considered by the board, including the plaintiff's written notation on the chart mentioned above and plaintiff's stated intention in conversation with the chief of the surgical service on December 13, 1987, to continue to refuse to see medical patients. The letter stated why these acts were felt to justify review, i.e. the acts violated 38 C.F.R. §820. The letter informed the plaintiff of the procedures under which the review was to be conducted: "under the provisions of 38 U.S.C. §4106(b), and in accordance with DM & S Supplement, MP-5, Part 11, Chapter 4." The letter stated the purpose of the review: "to conduct an impartial review and make recommendations to the appropriate approval authority whose

decision is final." Plaintiff was informed that he could appear and present evidence and argument with union representation and assistance.

The record contains plaintiff's December 19, 1987, letter to Dan Kadrovach in which plaintiff referred to the absolute corruption of absolute power and the inevitability of divine justice. Plaintiff also referred to the lack of surgical skills by medical practitioners and the lack of medical skills by surgical practitioners as being the bases for his conduct. A December 20, 1987, letter from plaintiff to John Bergstrom, Chairman of the Ad Hoc Standards Board, sets forth plaintiff's belief that he was not a probationary employee. This letter also contains plaintiff's contention that the bylaws authorized him to refuse to see medical patients. The letter concludes with plaintiff's pronouncement that he chose to absent himself from the review hearing because of a previously scheduled vacation.

Plaintiff's representative, Gary Blevins, requested by letter dated December 24, 1987, that the review be rescheduled, however, it was not. Plaintiff was notified by letter dated December 29, 1987, that because *Giordano v. Roudebush*, 617 F.2d 511 (8th Cir. 1980) held that the findings of a probationary review board are not subject to further review, DM & S Supplement, MP-5, Part 11, Chapter 4 would not apply, contrary to the earlier notification. Plaintiff received this notice on December 29, 1987.

As noted, plaintiff contended that the "bylaws" justified his actions. In plaintiff's December 7, 1987, letter to Dan Kadrovach, plaintiff clarified this position. The "Bylaws, Rules, and Regulations of Medical Staff of Veteran's Administration Medical Center, Fayetteville, Arkansas" of September 28, 1987, under Article 111, Section 2, provide that the medical staff subscribes to the code of ethics of the American Medical Association. Plaintiff then points out that the American Medical Association Principles of Medical Ethics requires that a physician be dedicated to providing competent medical service and shall, except in emergencies, be free to choose which patients to serve.

It thus appears that plaintiff argues that his refusal to treat medical patients was justified by the bylaws because the bylaws refer to the "code of ethics" and the code of ethics requires that physicians be competent and free to choose whom to serve. Essentially, plaintiff posits that the VA had no basis for disciplinary action based on plaintiff's refusal to treat medical patients because plaintiff is not competent to do so and because plaintiff did not want to.

Plaintiff confuses his "rights" as a physician in a free society with his obligations as an employee of the VA. It is true that plaintiff has the "right" to refuse to treat anyone he chooses, meaning that this is a course of action open to him. However, this does not mean that

the VA does not also have a corresponding "right" to consider such a refusal in formulating its employment decisions.

The court does not mean to belittle plaintiff's argument, for it is admirable that plaintiff chooses not to treat those whom he feels not competent to treat. However, it requires a quantum leap in logic to reason that from that proposition flows the conclusion that the VA is legally precluded from considering such a fact in its employment decisions. Certainly the VA is allowed to employ those physicians who do feel competent to treat assigned patients and who will do so, as opposed to those who do not and will not.

The record contains other documents reflecting plaintiff's continued refusal to treat patients in need of care. On December 9, 1987, plaintiff refused to treat Roscoe Anderson. On December 10, 1987, plaintiff refused to accept responsibility for the treatment of Ralph Bunch, Jr. and Ray Adamson. On December 12, 1987, plaintiff wrote in a patient's chart: "will sign off this pt. as I'm not accepting responsibility for care of medical patients."

The record indicates that plaintiff was somewhat overinclusive in the categories of patients he felt incompetent to treat. Plaintiff was assigned a patient who believed he was infected with pubic lice. Plaintiff requested a consultation from the dermatology

department. Dr. McAfee responded by writing on a routing and transmittal slip: "It is my belief that any physician can diagnose and treat crabs. . . ."

A December 16, 1987, memorandum to the Medical Center Director from Dr. McAfee, Acting Chief of Staff, fairly in the court's view, summarizes the situation and the evidence:

> 1. Due to the shortage of physician personnel on the Medical Service, assistance of the Surgical Service was requested by the Chief of Medical Service. It was requested that we loan them a physician for several weeks. . . . This was discussed with the Surgical Service staff and all agreed to cheerfully perform this service except for (plaintiff).
>
> * * *
>
> 4. On November 17, 1987, (plaintiff) had responded in writing that he would not assume care of any medical patients partly because of possible malpractice exposure and also because internal medicine was not his field of expertise. . . . I explained to (plaintiff) that this is not internal medicine, it is general medicine, and all general surgeons are qualified in this area. . . .

* * *

> 9. Because of (plaintiff's) refusal to cooperate, and Dr. Brannon's absence due to illness, it was felt that the Surgical Service did not have enough staff to continue to routinely accept medical service patients and this procedure was discontinued. . . .

* * *

> 10. [I]n fairness to (plaintiff) . . . he has stated at various times that he would see these patients if I re-assigned them to Surgical Service and if I changed the wording of my original memorandum. At the outset, three patients were in fact transferred to the surgical service and appropriately cared for by (plaintiff).

This memorandum seems to indicate that plaintiff refused the care of various patients not on grounds of competency, but on principle. The Ad Hoc board seriously considered plaintiff's competency argument and found:

> [I]n November, 1987, because of an extremely heavy Medical Service patient load, the Surgical Service Chief, Dr. David McAfee, agreed to help with these patients. It was understood that at any time a physician felt uncomfortable with

> a patient's 'Diagnosis and/or Treatment,' consultation would be made with the Medical Service and the patient's care would be looked after—either on a consultation basis and/or complete takeover of the patient's care by the Medical Staff.
>
> * * *
>
> It is duly noted that (plaintiff) had done general medical duties on the Surgical Service prior to this time, by taking care of patients with general medical problems. . . .

The board found plaintiff to have been insubordinate and that plaintiff was unreasonable and obstructive. The challenged directive requiring assistance from the surgical service was found to be reasonable and appropriate in its scope and nature. As a result, plaintiff was notified of his separation from service effective January 15, 1988.

If, in fact, plaintiff had been forced to treat patients without assistance in an area of specialty foreign to his, the court would be confronted with a much more troubling, and distinctly different, issue. The fact is that there is simply no support in the record that that occurred. The record amply demonstrates that plaintiff was asked to provide needed assistance in the area of general medicine with available consultation and support

from the medical service staff as needed. Thus, any danger of plaintiff's being solely responsible for a patient requiring medical care involving expertise and training above or different from that possessed by the plaintiff was minimal, if not entirely nil. Plaintiff implicitly recognized this when he stated that his primary objection was that the directive at issue be worded differently or that the patient involved be transferred to the surgical service. It is not contested that plaintiff had treated medical patients without incident prior to November, 1987.

In November, 1987, plaintiff objected to the VA's solution to a problem confronting it. The VA proposed a plan which would provide medical care to medical patients in need of such care. From the record, it appears that the VA was confronted not with a choice between adequate and inadequate care for medical patients, but rather between providing care to medical patients in the best manner possible and providing no care at all to some patients. The challenged directive was narrowly tailored in scope with sufficient protections to ensure quality treatment of medical patients.

The procedure employed by the VA was fair. It provided the plaintiff full, timely, and explicit notice of the basis for the disciplinary hearing, the possible results of such a hearing, and the procedures to be utilized. Plaintiff was allowed representation and an opportunity to submit anything he chose for consideration by the

review board. Plaintiff was given ample opportunity to cease the conduct of which the VA complained prior to the convening of the review board.

Suffice it to say that the court finds ample support in the record as supplemented to justify the action of the VA in terminating the plaintiff's probationary employment. Accordingly, defendant is entitled to judgment and plaintiff's complaint will be dismissed with prejudice.

A separate judgment in accordance with the above will be concurrently entered.

Dated May 11, 1989

H. FRANKLIN WATERS
United States District Judge

In the United States District Court
Western District of Arkansas
Fayetteville Division

E. Stanton Maxey, M.D. *Plaintiff*
v. Civil No. 88-5034
Dan G. Kadrovach, et al. *Defendants*

ORDER

On this 12th day of October, 1988, for the reasons set forth in a memorandum opinion filed contemporaneously herewith, the court finds that plaintiff's claims set forth in Counts I through IV of his amended complaint should be, and they hereby are dismissed.

IT IS SO ORDERED.

H. FRANKLIN WATERS
United States District Judge

In the United States District Court
Western District of Arkansas
Fayetteville Division

E. Stanton Maxey, M.D. *Plaintiff*
v. Civil No. 88-5034
Dan G. Kadrovach, David K. McAfee, M.D.
and The Veterans Administration, An Agency
of the United States of America, and
the United States of America *Defendants*

MEMORANDUM OPINION

I. Introduction

Pending before the court is the defendant's motion to dismiss plaintiff's amended complaint on jurisdictional grounds, or alternatively for summary judgment. For purposes of the court's discussion of the jurisdictional issues, it is assumed that the pertinent factual allegations of the amended complaint are true.

Plaintiff challenges, on several grounds, his termination from his employment as a probationary staff surgeon at the Veterans Administration Medical Center in Fayetteville, Arkansas. The jurisdictin of the court is purportedly invoked pursuant to the First and Fifth Amendments to the Constitution of the United States, The Administrative Procedure Act, 5 U.S.C. §701 et seq.,

and 28 U.S.C. §1331.

Plaintiff alleges that he was hired pursuant to authority granted in 38 U.S.C. §4104. From October 26, 1986, to August 3, 1987, plaintiff was employed as a staff surgeon at the Veterans Administration Medical Center in Big Springs, Texas. On August 3, 1987, plaintiff accepted an identical position with the VA facility in Fayetteville, Arkansas.

On November 16, 1987, defendant, McAfee, then serving as Chief of the Surgical Service, issued a memorandum to all staff surgeons providing, *inter alia*, that, because of an excessive workload for the department of medicine, members of the surgical staff would be assigned responsibility for the care of medical patients in addition to those surgical patients for which the surgical staff was traditionally responsible. Plaintiff objected orally and in writing to defendant, McAfee, ostensibly on the basis that the treatment of medical patients by the surgical staff would violate medical ethics and cause the quality of care accorded such patients to deteriorate.

On November 19, 1987, the acting chief of staff confirmed in writing the directives of the previous memorandum, and defendant, McAfee, supplemented this confirmation with a written opinion of the district counsel for the Veterans Administration to the effect that the plaintiff's reasons for failure to comply with the

directive were not valid.

On November 23, 1987, at plaintiff's request, plaintiff's counsel drafted a legal opinion as to the plaintiff's potential liability for malpractice which, although stating that the plaintiff was "exempted" from malpractice liability under the Federal Tort Claims Act, clearly indicated that the Veterans Administration policy to which plaintiff had objected violated the standard of care owed by the government to its disabled veterans. Copies of counsel's letter were sent to a congressman, two senators, and district counsel for the Veterans Administration.

Plaintiff was subsequently reprimanded by defendant, Kadrovach, for refusing to follow the instructions of defendant, McAfee. One day prior to the delivery of the reprimand, plaintiff, while making his rounds, wrote on a patient's chart that the plaintiff "does not accept responsibility for care of medical patients."

On December 15, 1987, plaintiff was notified that a Physician's Professional Standards Board would be convened to conduct a summary review of his probational appointment. The review was provided on December 30, 1987, resulting in the plaintiff's notification of his termination effective January 15, 1988.

In his amended complaint, plaintiff attempts to set forth five separate claims for relief. In Count I,

entitled "Constitutional Tort—Infringement of Free Speech by Individual Named Defendants," plaintiff essentially alleges that his protestations and conduct in refusing to assume responsibility for medical patients constitute protected expressions on matters of legitimate public concern and that the actions of defendants, McAfee and Kadrovach, in reprimanding and dismissing him violated his First Amendment rights. In Count plaintiff requests back pay, front pay, compensatory damages, and punitive damages from the separate defendants.

Count II is entitled "Constitutional Tort—Deprivation of Property Without Due Process by the Individual Defendants." In Count II, plaintiff alleges that his "profession as a surgeon constitutes a valuable property right" and that the separation of the plaintiff thrugh the actions of the individual defendants constitutes a deprivation of the plaintiff's property rights without due process for which the plaintiff alleges he is entitled to compensation.

Count III, termed "Constitutional Tort—Infringement of Free Speech by the United States of America," is, in essence, a restatement of Count I, substituting the United States as the offending party with an additional request for reinstatement.

Similarly, Count IV duplicates Count II replacing the averments against the individual

defendants with averments against the United States for which plaintiff suggests that he is entitled to reinstatement, a "clearing" of his employment record, and compensatory relief.

Count V purportedly arises under the Administrative Procedure Act. Plaintiff submits that his termination was "unlawful, arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, contrary to constitutional right, short of statutory right and without observance of procedure required by law. Plaintiff asserts that this entitles him to reinstatement, expungement of derogatory references in his record, and reimbursement of "current and past pay and benefits."

Defendants timely filed a motion to dismiss or alternatively for summary judgment arguing that (1) the Veterans Administration is not a suable entity *eo nomine;* (2) plaintiff's constitutional claims against the individual defendants (Counts I and II) are precluded because Congress has enacted an alternative remedy and "special factors" counsel against following such constitutional claims; (3) the individual defendants are immune from suit; (4) plaintiff cannot substantiate his First Amendment claim; (5) neither a liberty nor property interest are implicated by plaintiff's dismissal, and (6) procedural due process was observed in plaintiff's termination. With regard to the constitutional claims against the United States of America, defendants

assert that "because plaintiff's claims are essentially for monetary damages over $10,000, exclusive jurisdiction is in the Court of Claims. . . ."

II. Discussion

(a) The Tucker Act

Neither party mentioned the obvious jurisdictional issue pertaining to the exclusive of concurrent jurisdiction of the Court of Claims until the court raised the issue *sua sponte.* By letter dated July 21, 1988, the court requested counsel to brief the following three issues: (1) Does the court have jurisdiction of all or any portion of this case, or does the Tucker Act, 28 U.S.C. §1491 place exclusive jurisdiction in the Court of Claims? (2) if the court decides that it does not have jurisdiction of the back pay claims or other claims for damages, but does have jurisdiction to decide the equitable claims, does the court have discretion to transfer the entire matter to the Court of Claims? (3) if the court has jurisdiction to try part of the lawsuit, but not all of it, and has discretion to transfer the matter to the Court of Claims under those circumstances, should it?

The requested briefs have been received and reviewed by the court. From the briefs, it is apparent that the parties agree on the following propositions: (1) the Court of Claims has no jurisdiction over the claims

against the individual defendants; (2) this court has jurisdiction to grant the declaratory and injunctive relief sought against the United States if that is the "primary" relief sought; and (3) this court does nt have jurisdiction to award monetary damages against the United Sttes.

The Tucker Act, 28 U.S.C. §1491, provides the basic jurisdiction of the Court of Claims. That statute provides, *inter alia*, as follows:

> (a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded upon either the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * * * *
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records and such orders may be issued to any appropriate official

> of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any adminsitrative or executive body or official with such direction as it may deem proper and just.
>
> * * * * *

However, the Claims Court also has jurisdiction concurrent with that of the district courts in other civil actions or claims against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. §1346.

As noted, because the Court of Claims generally may only assume jurisdiction of claims against the United States, no issue arises under the Tucker Act as to plaintiff's claims against the individual defendants. This court's jurisdiction of such claims must stand or fall on other grounds and will be discussed *infra*.

In *Giordano v. Roudebush*, 617 F.2d 511 (8th Cir. 1980), the court was presented with a similar fact-situation. In that case Giordano was discharged as assistant chief of urology from the Veterans Administration hospital where he had been serving as a

probationary employee. The proffered reason for Giordano's termination was his failure to perform satisfactorily. Giordano challenged his dismissal in federal district court. The district court ultimately held that it did not have jurisdiction to award back pay in excess of $10,000 and ordered the entire damage claim transferred to the Court of Claims. The district court found, however, that Giordano's initial discharge was arbitrary and capricious and ordered Giordano's reinstatement.

On appeal, the Court of Appeals for Eighth Circuit held that, where the plaintiff's claims are primarily nonmonetary, the district court may assume jurisdiction of the nonmonetary claims. In *Giordano*, defendants argued that *Polos v. United States*, 556 F.2d 903 (8th Cir. 1977) dictated that the entire cause be decided by the Court of Claims. However, the court found *Polos* to be distinguishable because it was evident that in *Polos*, the plaintiff's principal claims were for back pay and participation in the Civil Service Retirement Program:

> *Polos' claim, then, is essentially one against the United States for the payment of damages.* Such a claim, when in excess of $10,000, is within the exclusive jurisdiction of the Court of Claims. *Polos* at 905 (emphasis added (footnote omitted).

> In contrast to Polos, Dr. Giordano has stated from the outset of this case that his claims are primarily nonmonetary.

Giordano at 515.

Thus, counsel are correct in their statements that, to the extent that plaintiff seeks monetary relief in excess of $10,000 on claims "not sounding in tort," ths court lacks jurisdiction of the same. The question remains, however, whether this court may assert jurisdiction of plaintiff's nonmonetary claims.

It appears, from *Polos* and *Giordano* that if plaintiff's claims may properly be characterized as "primarily nonmonetary," this court may exercise jurisdiction to decide the nonmonetary claims. In *Giordano*, the Eighth Circuit held that the plaintiff's claims in *Polos* were essentially for the payment of damages while the plaintiff's claims in *Giordano* were characterized as "primarily nonmonetary."

In *Polos*, the court stated:

> It is evident that Polos' principal claims are for back pay (an amount found to be $79,939.36) and for participation in the Civil Service Retirement program. While Polos contends he was entitled to reinstatment, he concedes that he could not retain the civilian technician

> position, because he is no longer a member of the Arkansas Air Naitonal Guard. See 32 U.S.C. §709(b). He does not seriously dispute that, even if reinstated, he could be discharged on thirty days' notice. 32 U.S.C. §709(e)(6).

Polos at 905.

In *Giordano*, however, the plaintiff stated from the outset that his claims were primarily nonmonetary. Giordano sought reinstatement and a "clearing" of his name. The court in *Giordano* found that when Giordano's suit was first filed his back pay claim was worth only $6,000 and that monetary relief was "clearly not his principal motive." *Giordano* at 515.

In the instant case, plaintiff seeks both monetary and nonmonetary relief. In Count III, plaintiff alleges that the actions of the United States caused "damages to Dr. Maxey in the amount of compensation he has lost pending date of trial, public embarrassment and any compensation he can prove lost as the result of future lack of employment." Plaintiff's amended complaint, p. 20. Plaintiff further alleges that "Dr. Maxey is entitled to reinstatment to his position, . . . expungement of the records . . . and any compensation due him pending reinstatement, as well as punitive damages . . . in the amount of one million dollars. . . . "

In Count IV, plaintiff stated that he is

"entitled to be reinstated . . . , his record cleared . . . and to be reimbursed all compensation which he has lost as a result of [his] separation." Plaintiff's amended complaint, p. 21.

In Count V, based upon the APA, plaintiff asserts that Dr. Maxey is entitled to "reinstatement as a staff surgeon . . . , deletion of all derogatory references in his record . . . and reimbursement to him of all current and past pay and benefits." Plaintiff's amended complaint, p. 22.

In light of governing case law, plaintiff's counsel quite naturally argues that the plaintiff's primary concern vis a vis the government is that he be reinstated to his position. To the extent that counsel for the plaintiff bases his argument upon plaintiff's subjective "concern," such an argument is immaterial.

In *Minnesota ex rel. Noot vs. Heckler,* 718 F.2d 852 (8th Cir. 1983), the Eighth Circuit, in addition to noting a decided split of authority on the Tucker Act issue, stated clearly that "[c]laims essentially seeking monetary relief over $10,000 fall within the Claims Court's exclusive jurisdiction which may not be evaded by framing a claim for injunctive relief or by requesting the exercise of mandamus jurisdiction." *Minnesota ex rel. Noot* at 859, n.12. The court indicated that, when the injury can be redressed fully by an award of damages, the claim is properly characterized as monetary. Similarly,

where declaratory relief would simply establish plaintiff's legal entitlement to the principal remedy, it is the primary focus of the principal remedy sought which controls. *Minnesota ex rel. Noot* at 859, n.13. This means simply that if the declaratory or injunctive relief sought has "significant" prospective effect or considerable value apart from merely determining monetary liability, the equitable relief sought is paramount and the district court may assume jurisdiction over the nonmonetary claims. *See Minnesota ex rel. Noot,* at 858 n.11.

It would have been helful for this court to have been made aware of the amount of back pay involved in plaintiff's claim, as well as his current employment status. There are factors considered by courts in determining the "significance" of the prospective effect or value of the declaratory or injunctive relief sought. See *Giordano,* at 515; *Polos* at 905; *Minnesota ex rel. Noot* at 858-60; *Keller v. Merit Systems Protection Board,* 679 F.2d 220 (11th Cir. 1982) at 223.

Without belaboring the point further, it appears to the court that the equitable relief sought by the plaintiff in this case has "significant" prospective effect or "considerable" value apart from any monetary liability of the government. As such, the equitable relief sought may fairly be considered "paramount" under the law in this circuit and this court may, therefore, assume jurisdiction of plaintiff's nonmonetary claims. *Giordano,*

supra; Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1983); *Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980) *cert. denied* 561 U.S. 970 (1981).

(b) The Bivens Claims

The next issue requiring the court's attention is whether the court may imply a *Bivens*-type action against the United States or its officers based upon the alleged violation of plaintiff's First and Fifth Amendment rights. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The primary obstacle to such actions against the federal government or its employees is *Bush v. Lucas*, 462 U.S. 367 (1983), and its progeny. In *Bush*, the Supreme Court held that a *Bivens* action is not to be implied if Congress has developed a comprehensive remedial system for the redress of a plaintiff's grievances or if "special factors" exist which counsel against such an implication.

Bush was discussed in *Premachandra v. United States*, 739 F.2d 392 (8th Cir. 1984). In that case, the Eighth Circuit concluded that Congress intended the civil service laws to provide the sole remedy for a wrongfully discharged Veterans Administration nonprobationary physician. However, as a nonprobationary employee, Premachandra was held to be entitled to challenge the termination decision in inter-agency proceedings, appeal to the Merit Systems Protection Board, and seek revied in the Federal Court

of Appeals. *See* 5 U.S.C. §§7513, 7703.

More on point is *Franks v. Nimmo*, 769 F.2d 1230 (10th Cir. 1986). In that case, Franks, a discharged probationary associate chief of staff for research at a Veterans Administration hospital, sought damages for the alleged deprivation of his First and Fifth Amendment rights. The Tenth Circuit concluded that the *Bivens* action was barred by the rationale applied in *Bush*. The plaintiff had argued that, because he was not a civil service employee and lacked the comprehensive administrative review rights of such employee, *Bush* was inapplicable. The Tenth Circuit noted that the same argument was presented by a VA physician and rejected in *Heaney v. United States Veteran Administration*, 756 F.2d 1215 (5th Cir. 1985). In *Franks* the court stated:

> A probationary VA physician who is separated from service under [38 U.S.C.] section 4106 may obtain judicial review of the administrative decision [citing *Giordano* and *Heaney*]. Such an administrative decision is a final agency action which may be appealed to a federal court pursuant to the Administrative Procedure Act. Under the Act, the administrative decision may be set aside if it is arbitrary or capricious, 5 U.S.C. §706(2)(A) (1982), or unconstitutional, *Id.* §706(2)(B); *Stretton v. Wadsworth Veterans Hospital*, 537 F.2d 361, 369 n. 19 (9th Cir. 1976). A physician who has been wrongfully

> discharged may obtain judicial relief in the form of reinstatement and back pay. . . . In addition, the court has power to grant interim equitable relief. . . . As in *Bush*, a plaintiff such as Dr. Franks has a forum in which to present constitutional claims, may receive judicial review of the administrative proceedings, and may obtain meaningful relief in the form of reinstatement and back pay.

Franks at 1239-40.

Although the VA physician in *Heaney* was not a probationary employee, the discharged VA physician in *Franks* was. Further in *Heaney*, the Fifth Circuit reasoned:

> Heaney asserts that *Bush* is inapposite to the present case because *Bush* held that a damages claim is precluded only where the alternative remedy available is meaningful; Heaney asserts the limited relief available under the DMS—in his case limited to reinstatement—is not meaningful redress for the violation of his first and fifth amendment rights. However, the remedy here certainly cannot be considered as meaningless as Heaney maintains; the above-quoted passage from *Davis* suggests that a scheme which provides for reinstatement offers an adequate measure of relief. This is entirely

> consistent with the often restricted availability of damages as opposed to equitable relief against governmental bodies under federal law. *See Bush* 103 S.Ct. at 2409 n. 12 [collecting cites]. In the present case, DMS regulations provide for reinstatement and other relief where an adverse personnel decision is found to be unconstitutional. Thus, the DMS system provides a measure of relief. This is enough to preclude a damages remedy.

Thus, the fact that relief was limited to reinstatement was found by the court to be insufficient to evade the application of *Bush*, barring the *Bivens* claim. That reinstatement is a sufficiently "meaningful" remedy is buttressed somewhat by cases of the Supreme Court which have allowed reinstatement as a remedy for constitutional violations but disallowed, in those case, damages to the injured employee on the basis of qualified immunity. See *Davis v. Sherer*, 468 U.S. 183 (1984). The issue in *Davis* was different from the one presented here, i.e. whether a *Bivens* claim should be implied at all, however, as the *Heaney* court noted, such cases suggest that a scheme affording reinstatement offers an adequate measure of relief.

This court would be more reluctant to accept the *Franks* rationale had the Supreme Court not recently expanded the "special factor" exception. In *Schweiker v. Chilicky*, No. 86-17681, 56 U.S.L.W. 4767 (U.S. June 24,

1986), plaintiffs brought *Bivens* claims against the Secretary of Health and Human Services, contending that they were denied due process as a result of the defendant's denial of Social Security benefits. The Supreme Court held that the continuing review statutes were a "special factor" precluing a *Bivens* action notwithstanding that only past-due benefits could be awarded under the statutes and compensatory damages were unavailable. Although this, in itself, is not particularly instructive the court stated that the special factor exception properly induces "an appropriate judicial deference to indications that congressional inaction has not been inadvertent." The court added that:

> When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the court of its administration, we have not created additional *Bivens* remedies.

Chilicky at 4770.

Plaintiff argues that, although non-probationary physicians of the VA enjoy sufficient protection of their First and Fifth Amendment rights via the various levels of appeal and due process, this is simply not the case with respect to a probationary employee.

The Eighth Circuit recently addressed the *Bivens*-preclusive effect of *Bush*. In *McIntosh v. Weinberger*, 810 F.2d 1411 (8th Cir. 1987), the court stated:

> The administrative remedy that was available to contest the demotion in *Bush*, an appeal to the Merit Systems Protection Board under 5 U.S.C. §§7512 and 7513, is not available here, because Turner's actions are not covered by this procedure. . . .
>
> * * * * *
>
> . . . Turner also suggest that he may have engaged in a prohibited personnel practice actionable by the Special Counsel of MSPB under 5 U.S.C. §1206. Moreover, even if we assume this to be true . . . the MSPB is authorized to take disciplinary action against Turner, but not to award any affirmative relief to the injured employee. 5 U.S.C. §1207(b). This is not adequate to bar a *Bivens* action. . . . We conclude with the District Court that the 'plaintiffs are without redress as to defendant Turner's actions in the absence of a constitutional remedy' . . . and therefore that their *Bivens* action is not barred by *Bush*.

McIntosh at 1435-36.

Thus, in *McIntosh*, plaintiffs were in a "damages or nothing" situation wherein a majority of courts have implied a *Bivens* action.

Further, although the limited protection afforded a probationary physician in the employ of the Veterans Administation may or may not, in this court's opinion, constitute a comprehensive plan by Congress substituted for the constitutional rights that a federal employee normally has, the Eighth Circuit has unambiguously declared that:

> The limited board review of a probationary physician's professional competency is the only procedure available to him. As discussed, in contrast to the plenary hearing in the case of a tenured employee required under [38 U.S.C.] §4110, a probationary physician is entitled to only a summary procedure. He is not entitled under the statutory scheme to any review of the Board's disciplinary action. Thus, our analysis, contrary to defendant's, is that *Congress intended the tenured employee to be given greater rights than a probationary employee.*

Giordano at 517 (emphasis supplied).

Of cases holding that a *Bivens* action should

be available to probationary federal employees challenging adverse personnel decisions, *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986) is typical. *Kotarski*, however, was vacated by the Supreme Court on June 27, 1988, for reconsideration in light of *Chilicky*. *See Cooper v. Kotarski*, No. 1813, 101 L.Ed.2d 897 (U.S. June 27, 1988). Thus, the Supreme Court has indicated that the *Bivens* claims asserted by the plaintiff in this case may be governed by *Chilicky*, and if indeed it is, then *Bush* precludes such an action. The court notes that the dissent in *Kotarski* forefully argued without reference to *Chilicky* that *Bivens* actions are unavailable to probationary federal employees insofar as adverse personnel decisions for the basis of the constitutional claims asserted. *See Kotarski* at 1351 (Hall, J., dissenting). This court concludes, as the Supreme Court has suggested, that *Chilicky* supplements and reinforces the reasoning of the *Kotarski* dissent and that analysis is adopted herein.

The court concludes that the remedies available to the plaintiff are meaningful and constitutionally adequate, even if not as extensive as those available to a nonprobationary employee. *Giordano* indicates clearly that "congressional inaction has not been inadvertent" in this area and that "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *See Chilicky* at 4770.

The court is aware that the Court of Appeals for the Federal Circuit has held that the Claims Court does not have jurisdiction to review a probationary employee's dismissal whether based upon allegations of regulatory or statutory violations, or constitutional infringement. *United States v. Connolly*, 716 F.2d 882 (Fed. Cir. 1983) ("Connolly II"). Plaintiff agrees, in the instant case, that the district court does not have jurisdiction to award money damages or back pay against the United States, and that if the court has any power at all in this matter, it has only "jurisdiction to grant the declaratory and injunctive relief sought by plaintiff against the United States." *See* plaintiff's counsel's letters to the court dated August 8, 1988, and August 3, 1988.

If *Giordano* and *Connolly II* are read together, then it is possible that no court has jurisdiction to award monetary relief with respect to plaintiff's claims. Even if this is the case, however, this does not of itself militate in favor of the availability of a *Bivens* action. In *United States v. Fausto*, No. 86-595 (U.S. Jan. 25, 1988), the Supreme Court held that a suspended employee of the Interior Fish and Wildlife Service could not maintain an action in the Claims Court under the Back Pay Act, 5 U.S.C. §5596, because the comprehensive and integrated review scheme of the Civil Service Reform Act, 5 U.S.C. (1982 Ed. and Supp. IV) "deliberately" excluded employees in Fausto's service category from the provisions establishing administrative

and judicial review for personnel action of the sort at issue. As a result, Fausto was held to have no right to administrative review, nor to judicial review in any court relying on Tucker Act jurisdiction.

Obviously, *Fausto* is a "far cry" from being directly "on point," however it does reflect that, where Congress "intentionally," even by implication, has established limited rights to administrative or judicial review of personnel decisions, it is of no consequence that no relief may be available at all. After all, that is what "probationary employee" means. It is intended that such employees not have the full complement of "rights" afforded "non probationary employees." The court feels constrained, in light of the foregoing, to conclude that a *Bivens* action is not available to a claimant under the circumstances present in this case.

Counts I through IV of plaintiff's amended complaint all "sound" in "constitutional tort" of the type established by *Bivens* and disallowed in *Bush*. As noted, plaintiff, himself, has denominated these counts as "constitutional torts." Accordingly, defendant's motion to dismiss or for summary judgment will be granted as to these counts.

This disposition has rendered "moot" the other issues raised.

The parties are directed to brief, within 14

days from the date of this opinion, the issues of the scope of judicial review available to the plaintiff under the allegations of Count V of the amended complaint and the remedies theoretically available thereunder.

Dated: October 12, 1988

H. FRANKLIN WATERS
United States District Judge

United States Court of Appeals
For the Eighth Circuit

No. 89-1973WA

E. Stanton Maxey, M. D.
Appellant

v.

Dan G. Kadrovach, et al,
Appellees.

Appeal from the United States District
Court for the Western District of Arkansas.

Appellant's petition for rehearing has been considered by the Court and is denied.

January 12, 1990

Order entered at the Direction of the Court:
ROBERT D. ST. VRAIN
Clerk, U. S. Court of Appeals, Eighth Circuit.

Veterans Administration
Medical Center
Big Spring TX 79720
October 9, 1986

Dr. Edward S. Maxey
3912 E. Piccadilly Rd., Apt. #7
Phoenix, AZ 85018

Dear Dr. Maxey:

This is to officially confirm your Excepted Appointment as Staff Surgeon with our medical center at a Chief Grade, Step Ten, at a basic salary of $67,940 per annum effective October 26, 1986. this appointment is subject to a satisfactory completion of a physical examination to be conducted at the VA Medical Center in Phoenix, Arizona on October 14, 1986. You will report for duty in this office October 27, 1986 (Monday) at 8:00 A.M.

You will find enclosed a packet of processing forms to be completed and returned to this office in the enclosed envelope prior to your reporting for duty. Also enclosed is VA Form 5-3918 (ior First Duty Station). Please complete Part II and sign in Block 31A. You will then need to turn the form over and sign the agreement to remain in the Government Service for twelve months (or repay the government for costs of travel and transportation.) The completion of this form and signatures required are necessary in order that your moving

expenses will be paid.

If you have questions regarding the above, please contact Patsy Sharpnack, Personnel Staffing Specialist, 915 263-7361, Ext. 335.

We are also sending you a local newspaper and other informative material about the City of Big Spring. If there is anything else you need to assist you in your move, please let me know.

It is with pleasure that I welcome you as a member of our staff, and we look forward to your entering on duty.

Sincerely,
STEPHEN K. SINCLAIR
Personnel Officer

Personnel Service
Veterans Administration Medical Center
Big Spring, Texas 79720

Name: Edward S. Maxey Position: Staff Surgeon
You have been selected for Full Time Permanent, Excepted appointment Effective October 26, 1986.
( ) Please pick up physical examination forms from Personnel Service _____
(X)Report for processing in Personnel Service at 8:00 a.m., Monday, October 27, 1986
(X)Please fill out the following forms and bring them_____

( ) Application
(X) SF 256, Self-Identification of Medical Disability, and/or
( ) SF-177, Statement of Physical Ability
(X) TD-W-4
(X) SF-61B
(X) SF-85
(X) SF-144 (Only if you had prior Government/civilian or military/service.
(X) VA Form 5-4637 Educational Data.
( ) Transcript from your school of nursing (must have before you can be converted perm
(X) Car license number, car make, model and year (if you will drive to work.)
(X) Proof of license to practice your profession: ( ) certification of licensure and/or ( ) current

registration with expiration date.

(X) Please bring your military discharge (DD-214) or other document showing dates of military service (Need a DD-214 for each period of service.)

(X) SF-15 and proof of 10-point veteran preference if you claim 10-point preference.

(X) SF 181 Race and National Origin Identification.

(X)Attached pamphlets are for your information. Please try to decide by time you start to work whether or not you want your Federal Employees Group Life Insurance and if so, whether regular only or both regular and optional; and Federal Employees Health Benefits and if so which plan and option.

(X) SF 105, Certificate of Membership, CSC Retirement System.

(X) SF 2817A, Federal Employees Group Life Insurance Program.

(X) SF 2809-A, The Federal Employees Health Benefits Program.

(X) Health Benefit Brochures

THIS IS NOT A COMMITMENT FOR EMPLOYMENT

NOTIFICATION OF PERSONNEL ACTION

Name: Maxey, Edward S., M.D. SSN 267-09-0404
Date of Birth: 07-24-24 Veteran Preference: 1

(None)
Serv. Comp. Date: 10-26-86 Tenure: I
Retirement: FICA and CS 1.3% Sex: M
Regu: Basic Life Only FLSA: E (Exempt)
Effective Date 10-26-86 Work Schedule F (Fulltime)
Annuitant Indicator: 9 (Not Applicable)
Nature of Action: Excepted Appointment
Authority: 38 U.S.C. 4104/1/
To: Position Title and Number: Physician 000000
Name and Location of Employing Office:
VA Medical Center
Patient Care Svcs Surgical Service
Big Spring TX
Pay Plan: VM 0602 Grade or Level: Chief
Step or Rate: 10 Salary: $67,940.00*
Pay Bases: PA
Duty Station: Big Spring TX Position Occupied: 2 (Excepted)
Appropriation Code: 82C2.2280
*+$12,318 Special Pay Authorized under 38 USC 4118 NTE 10-25-90. Under PL 96-330, special pay is basic pay for CS retirement and life insurance purposes, but not for purposes of any other benefit related to basic pay. For CS retirement purposes, employment must be full-time.
Subject to completion of 2 year probationary period commencing * 00-00-00

Above-minimum entrance rate in accordance with KF-5, Part II, Chapter 3, Section D

CSRS coverage at appointment: No prior coverage.
Approving Official: Personnel Officer Date: 10-26-86

Notice to Employee

Keep this document for your records. It is a copy of the official record of a personnel action affecting your employment. Promptly call any error to the attention of your supervisor or your personnel office.

I. Condition Pertinent to All Types of Personnel Actions

The personnel action identified on the face of this form is subject to all applicable laws, rules and regulations governing Federal employment and may be subject to investigation and approval by the U. S. Office of Personnel Management. The action may be corrected or canceled if not in accordance with all legal requirements, or if based upon your misrepresentation or fraud.

In addition, the grade of the position to which you are officially assigned may be reviewed and corrected by your agency personnel office of by the U. S. Office of Personnel Management.

Items 8 and 9 show common types of payroll deductions: "FEGLI" for Federal Employees Group

Life Insurance, "CS" for Civil Service Retirement, "FICA" for Social Security, and "FS" for Foreign Service. Additional deductions may be made under the Federal Employees Health Benefits Program and for income taxes, bonds, and other purposes authorized by law.

II. Information About Appointments

Appointments to positions in the competitive service: The Civil Service Act places most positions in the "competitive service." The U. S. Office of Personnel Management sets qualification requirements and controls recruitment for such positions. As a general rule, persons selected from civil service registers to fill continuing jobs in the competitive service are given career-conditional appointments. Such appointments are secured through direct competition with other members of the general public seeking similar work in Government agencies and permit qualified employees to be assigned without further competitive examination to other jobs in the competitive service. Career-conditional appointments become career appointments upon completion of 3 years of substantially continuous creditable service.

The first year following a non-temporary competitive appointment generally is a probationary period during which an appointee must demonstrate full competence and fitness for Federal employment. Reinstatements are

also subject to a probationary period unless one was previously completed. Transfers, promotions, changes to lower grade, and reassignments during a probationary period are subject to completion of probation.

Temporary appointments do not confer a civil service status and do not lead to a career or career-conditional appointment without some further examination or qualification. Limited temporary appointments are made when there is no continuing need for a person's service, regardless of the manner in which he or she qualified for appointment; acceptance of such appointment will not remove a person's name from a civil service register on which he or she may later be reached for career-conditional appointment.

Appointments to positions in the excepted service: Excepted appointments are made to positions which are excepted from the competitive service by law or other special authority. Generally the employing agency sets qualification requirements and conducts recruitment for such positions. Such appointments do not confer a competitive civil service status or eligibility for movement to jobs in the competitive service, they may be made without restrictions on tenure, with a conditional or indefinite limitation, or with a defined time limitation. A trial period may be required at the discretion of the employing office.

Appointment to positions in Senior Executive Service

(SES): SES appointments are made to executive positions with managerial, supervisory or policy functions. SES career appointments are obtained through competition with other civil service employees or civil service employees and members of the general public. The first year of an initial SES career appointment is a probationary period, during which the appointee must demonstrate full competence and fitness for such employment.

SES noncareer and limited appointments do not confer competitive civil service status or lead to SES career appointments.

III. Information About Tenure Groups

Employees are ranked in tenure groups according to the nature of their appointment; those with unrestricted tenure are placed in Group 1; those serving under conditional appointments which automatically lead to full tenure after a prescribed time and without further qualification are placed in Group 2; and those serving under temporary or indefinite appointments not limited to an exact time or date are placed in Group 3. Within each tenure group, ranking is determined by veteran preference, performance rating, and total federal service. If it should become necessary to reduce force, employees are selected for separation or change to lower grade according to the general ranking. Employees serving under competitive appointments and those serving under

excepted appointments are ranked separately for reduction in force purposes.

Tenure group as used for reduction in force purposes does not apply to the Senior Executive Service. Code O may be shown in the tenure group for these employees.

IV. Information About Your Status After Separation

If you are separated or placed in a nonpay status for an extended period, your employing agency will furnish you with Standard Form explaining your rights to unemployment insurance benefits. If you are covered by the Civil Service Retirement System or Federal Employees Group Life Insurance, you have previously been furnished certificates describing these programs. Such certificates have information regarding your rights and possible benefits after separation.

If you are separated from a career or career-conditional appointment, you may have reinstatement eligibility and may apply directly to any Federal activity and may be employed without further competitive examination. If you are a nonveteran and you are separated from a career-conditional appointment your eligibility for reinstatement is generally limited to 3 years from the date of separation. If you are separated from a temporary or excepted appointment you have no reinstatement privileges based upon such service.

If you are separated from an SES career appointment, you may have reinstatement eligibility to the SES. You should apply directly to any Federal activity. If you are separated from an SES noncareer or limited appointment, you have no reinstatement privileges based upon such service.

You will be given any lump sum payment that may be due you for annual leave at the time of separation. Refund of an appropriate portion of this payment will be required if you are reemployed in a Federal agency in a position under the same leave system during a period covered by such payment.

V. Availability of Further Information

Consult your supervisor if you have questions about the above statements or the entries on the front of this form, or about other matters concerning your employment. This is particularly important in questions involving granting of leave, assignment of duties, and hours of work which are generally under the supervisor's control. If your questions are technical, your supervisor may refer you to your personnel office, which will have copies of controlling regulations, as well as your individual records and how they apply in your case.

MEMORANDUM

Date: July 30, 1987
From: Acting Chief, Surgical Service (112)
Subj: Clinical Privileges
To: Chairman, Clinical Executive Board (11)

Request the following clinical privileges for the new staff general surgeon, E. Stanton Maxey, M.D.:

General Surgery

E. Stanton Maxey, M.D. is Board Certified in General Surgery.

(a) This Specialty Board certifies competency in surgery of the gastrointestinal tract, abdomen, breast, head and neck, peripheral vascular surgery, surgery of the endocrine system and includes surgery for trauma of the musculoskeletal system and head injuries. In emergency situations, uncomplicated surgery of the genito-urinary tract, chest case, orthopedic surgery, and peripheral nervous system is allowed since by training and experience they are knowledgeable in these areas. Also included are diagnostic angiography and endoscopy. Consultations should be utilized in complicated cases and in those cases involving unusual surgical risk.

(b) These privileges do not include brain surgery or major thoracic surgery such as pneumonectomy and/or

lobectomy. These cases will be transferred. Only in exceptional circumstances may such cases be allowed provided a consultant thoracic surgeon or neurosurgeon is present and scrubbed.

Class 1. Major General Surgery

a. Permission for any operative procedure, emergency or elective, qualified as outlined in paragraphs a and b above:

DAVID K. MCAFEE, M.D.

Recommend Approval:

MEMORANDUM

Date: July 30, 1987
From: Acting Chief, Surgical Service (112)
Subj: Temporary Clinical Privileges
To: Chief of Staff (11)

1. Request temporary clinical privileges for E. Stanton Maxey, M.D.

2. Clinical privileges will be formally requested at the August Clinical Executive Board, see attached.

DAVID K. MCAFEE, M.D.

End.1

To: Medical Center Director (00)
Thru: Associate Medical Center Director (001)
Special Assistant to Director (007)

Recommend APPROVAL of temporary Clinical Privileges for E. Stanton Maxey, M.D., as requested.

JACK D. FICKEL, M.D.
Chief of Staff

Temporary Clinical Privileges for E. Stanton Maxey, M.D., APPROVED/DISAPPROVED:

DAN G. KADROVACH
Medical Center Director
Date: 8-6-87

MEMORANDUM

Date: August 10, 1987
From: Acting Chief, Surgical Service (112)
Sub: Surgical Privileges Application and Instructions

To: All Surgical Service Physicians

1. This packet contains a list of surgical procedures in your specialty. Privileges must be requested in *all areas* that you desire to practice. Desired privileges in this specialty that are not listed, should be itemized under, "Other Privileges." Practitioners will be considered for privileges based on the area requested, qualifications and experience. It should be noted that in a *"life threatening emergency,"* a practitioner may render whatever care he believes to be indicated, regardless of the privileges requested.

2. Privileges should be requested in the following manner:

____If a full category credential is desired, check box #1 to the right of the category level in the clinical area involved.

____If limited privileges in a given category are desired, check box #2 to the right of the category level and check the box adjacent to specific privilege requested.

____If no privileges are desired in a given category, check box #3 to the right of the category level.

DAVID K. MCAFEE, M.D.

Clinical Privileges—Surgery

Gen. Surgery 1

_Appendectomy
_Abdom.-Perineal Resect.
_Resect. Lge. or Sml. Bowel
_Gastric Resection
_Gastroenterostomy
_Pyloroplasty
_Vagotomy
_Ramstead procedure
_Cholecystectomy
_Common Duct Explor.
and Repair
_Enteroenterostomy

_Splenectomy
_Adrenalectomy
_Pancreatectomy
_Fundoplication
_Omental Resection
_Whipple Procedure
_Radical Node Dissection
(retroperitoneal)
_Partial Hepatectomy
_Choleocystojejunostomy
_Pull-Through Procedure

Rectum 1

_Rectal Biopsy
_Anal Fissure

_Fistula-In-Ano
_Sigmoidoscopy
_I&D Abscess
_Hemorrhoidectomy,
Internal & External
_Endoscopy Polypectomy
_Anoplasty
_Rectal Prolapse

Thyroid 1
_Thyroidectomy
_Thyroglossal Duct Cyst
_Parathyroidectomy With or
Without Sternal Split

Skin & Subcutaneous 1
_Electrodesication, Warts
_Suture, Uncomp. Wound
_Excision Simple Lesions
Cysts, Nevi, Limpmata

Gen. Surgery 1
Hernia Repair
_Diaphragmatic
_Femoral
_Incisional
_Inguinal
_Other

Endoscopic Proc. 3
_Bronchoscopy
_Duidoscopy
_Esophagoscopy
_Gastroscopy

_Peritoneoscopy
_Colonoscopy
_Laryngoscopy
Lymph Channels and Nodes 1
_Biopsy
_Incision and Drainage
_Excision
_Radical Lymphadenectomy
Breasts 1
_Excision of Tumor or Cyst
_Incision and Drainage,
Abscess
_Mastecomy, Simple
_Mastectomy, Radical
_Mammoplasty
Vascular 2
_Aneurysmectomy, Abd.,
Peripheral
_Bypass Arterial Surgery
_Embolectomy
_Thrombectomy
xVeinstripping & Ligation
xVena Cava Plication
and Clip.
_Portacaval Shunts
_Mesocaval Shunts
_Endarterectomies
_Arteriography
Excision 2
xBranchial Cleft Cysts

xParotid Gland With or
Without Rad. Neck
xTumor, Nose or Sinus
_Burns, 1st, 2nd, 3rd (10%)
_I&D Superficial Abscess
_Deep Abscess, Thyroglossal
Duct, Cyst, etc.
_Excision Ingrown Toenail
_Skin Grafting
_Pilonidal Cyst
Lungs, Pleura, Cardiovascular 2
_Pleural Abrasion/Stripping
_Tumor
_Trauma
_Pulmonary Resec. or Biopsy
_Transthoracic Hiatal Hernia
_Diag. & Ther. Endoscopy
_Diaphragm & Chest Wall
_Phrenic Nerve
_Escophageal Resection
_Heller Myotomy
_Rib Resection
_Drainage Lung Abscess/Empyema
_Repair Vascular Injuries
i.e. Carotid, Subclavian,
Innominate
_Dx & Rx Thoracic Outlet
Syndrome
_Surgical Care, General
_Tracheal Resection

_Repair of Tracheal-
Esophageal Fistula
_Mediastinal Tumor, Excis.
_Pericardiectomy
_Pulmonary Lobectomy
_Thoracotomy, Explor.
_Thromboembolectomy, Axill.
_Thromboembolectomy, Fem.
xThoracentesis
xTube Throacostomy
BONES AND JOINTS 2
xJoint Aspirations
xBursa Injections
xI&D Hematomas
xI&D Bursae
xI&D Abscess
xExc. Ganglia, Nodules
xAmputation, Simple
(fingers, toes, etc.)
xAmputation, Major
xTendon Repair
_Extensive Lingual Tumor
_Nasopharyngeal Tumor
_Oropharyngeal Tumor
_Hypopharyngeal Tumor
_Laryngectomy
_Zenker's Diverticulum
xRadical Neck Dissection
_Endoscopic Excision Tumor
xTracheostomy

GENITOURINARY
xCircumcision
_Cystoscopy, Urethroscopy
_Cystectomy
_Cystotomy
_Epididymectomy
xHydrolectomy
_Nephrectomy Partial/Total
xOrchiectomy
_Prostatectomy
xVaricocele
xSpermatocoelectomy
_Ureteroneocystostomy
_Harvest Donor Kidney
xHysterectomy
xSalpingo-oorphorectomy
_Pelvic Extenteration
xPlastic Operation on
Kidneys or Ureters
NERVOUS SYSTEM2
_Cervical Sympathectomy
_Dorsal Sympathectomy
xLumbar Sympathectomy
_Carotid Endarterectomy
_Degenerative Carotid Sinus
xLigation, Carotid Artery
_Expl. & Repair Peripheral
Nerves
_Internal & External
Neurolysis

xLumbar Puncture
_Nerve Block
_Emergency Care, General
_Laminectomy
MISCELLANEOUS SKIN2
_Severe Facial Lacerations
xHand Lacerations
xExc. Skin Neoplasms
xExc. Hemangiomata
xExc. Dormal Tumors
xTendon Repaid
xGanglion, Wrist
_Hemipelvectomy
_Forequarter Amputation
_Bone Biopsy
xClosed Reduction of
Fracture of Dislocation
BURNS1
_1st Degree,
Local Treatment Only
_2nd & erd Degree, Local
Treatment Only
CAST APPLICATION1
_Long Arm Cast
_Short Arm Cast
_Long Arm Splint
_Short Arm Splint
_Long Leg Cast
_Cylinder Cast
_Short Leg Cast

_Walker Addition
_Long Leg Splint
_Short Leg Splint
CAST REMOVAL1
_ Bivalve
_Arm or Leg
_E.D.F. Cast
_Pedicle Graft
_Tubular Graft
_Reparative Hand Surgery
xRepair Lacerations, Simple
Complex
TUBE INTRODUCTION2
xEndotracheal Intubation
xTracheostomy
xTube Tracheostomy
xFoley Catheter
_Suprapubic Catheter
_Peritoneal Lavage
xInsert CVP Lines
_Insert Arterial Lines
OTHER PROCEDURES

_____

_____

Petitioner's Appendix continues
in the next volume.

No. 89-1608

SUPREME COURT, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

E. STANTON MAXEY, M.D.,

Petitioner

v.

DAN G. KADROVACH, DAVID K. McAFEE, M.D. AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S APPENDIX

WILLIAM JACKSON BUTT II
Counsel of Record
DAVIS, COX & WRIGHT
Post Office Drawer 1688
Fayetteville, Arkansas 72702-1688
(501) 521-7600

TREVATHAN PRESS ▪ LITTLE ROCK

Bylaws, Rules and Regulations
Of Medical Staff of
Veterans Administration Medical Center
Fayetteville, Arkansas

Preamble

Recognizing that the Medical Staff is responsible for the quality of medical care in the Medical Center and exercises this responsibility subject to Veterans Administration Regulations and the ultimate authority of the Medical Center Director, and realizing that the best interests of the patients are served by concerted effort, the Medical Staff of this Medical Center hereby organizes itself in conformity with the Bylaws, Rules and Regulations hereinafter stated.

For the purpose of these Bylaws, the words, "Medical Staff," shall be interpreted to include all Doctors of Medicine, Doctors of Osteopathy, and Doctors of Dental Surgery who are to attend patients in this Medical Center.

The governing body of this Medical Center is composed of the Medical Center Director, Associate Medical Center Director, and the Chief of Staff. Appointments to these positions are made by Veterans Administration authorities in the Department of Medicine and Surgery at the Central Office in Washington, D. C. The members of the Clinical Executive Board and the Administrative

Executive Board *via* the Joint Conference Council are responsible to the Medical Center Director in assisting with the management of the Center functions.

Article I.

The name of this organization shall be the Medical Staff of the Veterans Administration Medical Center, Fayetteville, Arkansas.

Article II.

The purpose of this organization shall be:

1. To insure, through an effective quality assurance program, that all patients admitted to this Veterans Administration Medical Center, or treated in the Ambulatory Care or Outpatient Sections, including the Mental Hygiene Clinic, receive care of the highest quality.

2. To provide a means whereby problems of a medico-administrative nature may be discussed by the Medical Staff with administrative authorities.

3. To receive and implement Rules and Regulations adopted by the Department of Medicine and Surgery of the Veterans Administration.

4. To provide opportunity for education and training

in medical and administrative areas within the Medical Center's capabilities, to establish such opportunities, and to maintain standards of endeavor in such projects as would be acceptable to national or state accrediting bodies or both.

5. To provide opportunities for research activities which are under the direction of the Chief of Staff.

Article III.

Section 1. Qualifications

a. Be a citizen of the United States, or a non-citizen approved by the Chief Medical Director of the Veterans Administration.

b. Hold a degree of Doctor of Medicine, Doctor of Osteopathy, or Doctor of Dental Surgery or Doctor of Dental Medicine, from a college or university approved by the American Medical Association Council on Medical Education, with the American Osteopathic Association or by the American Dental Association Council of Dental Education.

c. Physicians should have completed at least one year post-graduate education following medical school in a hospital approved by the Council of Medical Education of the American Medical Association or the American Osteopathic Association.

d. Both physicians and dentists must be licensed to practice in any state or the District of Columbia. Physicians not licensed to practice in any state or the District of Columbia may be appointed members under the provisions of 38 U.S.C. 4114(d).

e. Physicians on a temporary, full-time, part-time, intermittent or without compensation basis will be eligible for membership subject to the above qualifications and those covered by Sections 3, 4, 5 and 6.

f. In accordance with Veterans Administration Central Office Regulations, the Professional Standards Board of this Medical Center (Article VII, Section 2, para. 1), initiates the processing of appointments of staff physicians and dentists, completed under published Veterans Administration Regulations.

Section 2. Ethics and Ethical Relationships.

Generally, full-time physicians and dentists in the Department of Medicine and Surgery will not engage in outside professional practice. Exceptions to this rule will require approval of the Medical Center Director or the Chief Medical Director, as appropriate, and will be subject to Veterans Administration Department of Medicine and Surgery Regulations and directives, as published.

The Medical Staff of this Medical Center subscribes to the code of ethics of the American Medical Association, the American Osteopathic Association, and the American Dental Association.

Section 3. Terms of Appointment.

Governed by Veterans Administration Regulations.

Section 4. Procedure of Appointment.

Governed by Veterans Administration Regulations.

Section 5. Appeals.

Governed by Veterans Administration Regulations. In addition, certain procedural processes will be tailored to collate with the Agreement, established April 9, 1976, with the Professional Unit of the American Federation of Government Employees Local 2201.

Section 6. Emergency and Temporary Privileges.

Temporary staff privileges will not be routinely granted. However, in an emergency where a suitably qualified professional staff member is not available, the Medical Center Director may call upon an available specialist for assistance in meeting the clinical situation and grant temporary staff privileges for such emergency purposes.

Section 7. Unethical Behavior or Behavior Causing Discredit to the Veterans Administration.

Unethical behavior or behavior causing discredit to the Veterans Administration may call for separation of any member of this staff, as provided by Veterans Administration Regulations. In addition, certain procedural processes will be tailored to collate with the agreement with the American Federation of Government Employees.

Section 8. Right of Appeal from Staff Decisions.

Veterans Administration Regulations provide the right of appeal from staff decisions. The appeal goes to the Medical Center Director through the Chief of Staff. The same Regulations provide for appeal to higher authority within the Veterans Administration. In addition, the same procedural processes with the American Federation of Government Employees will be collated.

Article IV.
Categories of Professional Staff

Section 1. Categorically, the Medical Staff may comprise (a) full-time and part-time physicians and dentists as active members; (b) consulting physicians and dentists. Appointment of these staff members is governed by Veterans Administration regulations.

Section 2. The Active Medical and Dental Staff.

The full-time and part-time members of the Medical Staff are responsible for patient care and treatment.

Second 3. Consultant and Part-Time Physicians

The consultant staff consists of physicians, dentists, and Ph.D.'s of recognized competence who are in private practice in the community. These individuals may visit the Medical Center on a "regular" or "on call" schedule to consult with the active staff in the care and treatment of patients. They are encouraged to be active also in the teaching, training, and research programs.

Section 4. The Honorary Staff

Certain retired professional staff members may be given Medical Center privileges to see patients on an outpatient basis under the provisions of work without compensation and in concordance with Article VI, Section 2.

Article V.
Professional Services

Section 1. The Professional Services in the Medical Center under the Chief of Staff consist of:

Medical Service

Surgical Service
Radiology Service
Clinical Laboratory
Rehabilitation Medicine Service
Dental Service
Pharmacy Service
Nursing Service
Social Work Service

Section 2. Assignment of Professional Services

Assignment of the professional staff depends upon the individual's professional qualifications.

Section 3. Organization of Services

a. The Medical Center Director will be responsible for the proper and efficient management of the Center.

b. Each service is organized as a component of the staff as a whole with a service chief who is responsible to the Chief of Staff for the functioning of his service. The chief of each service has general supervision over clinical work falling within his service.

c. Each service may meet separately but such meetings shall not release the members from their obligation to attend the general meetings provided in Article VIII of these Bylaws.

Article VI.
Determination of Qualifications

Section 1. Individual qualifications are reviewed at the time of initial appointment by the Professional Standards Board of this Medical Center.

Section 2. Delineation of Clinical Privileges

Delineation of clinical privileges will be documented for all professional personnel involved in direct patient care to assure the highest quality of treatment at this health care facility. Privileges will be requested by the health care provider and approved by the appropriate Chief of Service. They will then be submitted to the Medical Center Director for approval or disapproval through the Clinical Executive Board and the Chief of Staff. The delineation of clinical privileges will be reviewed annually by the appropriate Chief of Service and submitted for approval or disapproval as stated above.

Section 3. Reduction or Revocation of Clinical Privileges

Clinical privileges may be reduced at the voluntary request of the staff member or may be reduced or revoked by the Medical Center Director upon recommendation of a properly constituted investigative board based on findings of deficiencies in professional performance in accordance with the guidelines published in Department of Medicine and Surgery Circular 10-86-

41, dated March 31, 1986.

Article VII
Medical Staff Officials and Committees

Section 1. There are no elected officers of the Medical Staff at this Medical Center. Overall management is provided by the Medical Center Director, Associate Medical Center Director, and Chief of Staff.

Section 2. Committees and Meetings

The committee structure at the Medical Center is mandated by Central Office directives and Medical Center Memoranda.

a.	Clinical Executive Board	Meets monthly
b.	Emergency Preparedness Committee	Meets annually or at call of Chairman
c.	Environmental Control Committee	Meets monthly
d.	Medical Center Education Training and Development Committee	Meets Monthly
e.	Joint Conference Council	Meets quarterly
f.	Laboratory Utilization Review	Meets quarterly
g.	Medical Library Advisory Committee	Meets semi-annually or at call of Chairman

h.	Medical Rehabilitation and Discharge Planning Board	Meets at call of Chairman
i.	Physician Professional Standards Board	Meets at call of Chairman
j.	Quality Assurance and Utilization Review Committee	Meets monthly
k.	Pharmacy and Therapeutics Committee	Meets monthly
l.	Tissue Committee (includes transfusion review)	Meets monthly
m.	Tumor Board	Meets monthly immediately following Tissue Committee
n.	Medical Center Patient Education Committee	Meets monthly
o.	Geriatric Health Services Planning Committee	Meets monthly or at call of Chairman
p.	Medical Records Committee	Meets monthly
q.	Physical Standards Committee	Meets at call of Chairman
r.	Intensive Care Unit Committee	Meets monthly

Individual meetings of all professional services are encouraged on a monthly basis. These meetings will be called by the service chief.

Article VIII.
Meetings

Section 1. Annual Meeting

Each service chief presents a Systematic Program Management Review once a year to the Medical Center Director.

Section 2. Regular Meetings

a. The Director's Staff meeting is held monthly.

b. Meeting of the Medical and Dental Staff is held monthly under the chairmanship of the Chief of Staff.

c. Regular and special meetings of the several Medical Center committees will be held as stated in the appropriate governing Medical Center Memoranda, with attendance requirements governed individually according to Veterans Administration Medical Center policies.

Section 3. Special Meetings

A special meeting of any committee or Service may be called by or at the request of the Medical Center Director, Chief of Staff, or Service Chief.

Section 4. Attendance and Quorum

a. Attendance of the full-time staff is mandatory except for official excuse, e.g., annual and sick leave, authorized absence, and for attendance on emergency

medical problems.

b. A numerical majority of the active members will constitute a quorum at any meeting.

c. The members of the consulting and part-time staff are encouraged to attend all staff meetings but their attendance is not mandatory.

d. Written notice of meetings stating the hour, date and place of meetings will appear in the Daily Bulletin.

e. Persons serving under these Bylaws as ex-officio members of a committee shall have all the rights and privileges of regular members, including voting, except they shall not be counted in determining the existence of a quorum.

f. (1) Attendance at the Director's Staff meetings is mandatory for all Service Chiefs or their alternates.

(2) Attendance at the Clinical Executive Board meetings is mandatory for all members or their alternates.

(3) For other than excused absences, an eighty per cent (80%) attendance, per person, is mandatory for full-time staff at all Medical and Dental Staff meetings, Service

meetings and other assigned clinical meetings and committees.

(4) Part-time staff shall be required to attend their Service meetings at least quarterly.

Section 5. Minutes

Minutes of each regular and special meeting of a committee or Service shall be prepared and shall include a record of the attendance of members and the vote taken on each matter. The minutes shall be signed by the presiding officer. Each committee and service shall maintain a permanent file of the minutes of each meeting.

Section 6. Agenda

The agenda of all meetings will be prepared by the chairman of the respective committee or board.

Section 7. Continuing Medical Education

a. A medical center calendar is prepared and disseminated monthly by the Chief of Staff which contains a schedule of all continuing medical education meetings and programs. These meetings are tailored to fit various categories to satisfy American Medical Association requirements for the Physician Recognition Award and for various state relicensure requirements.

b. Appropriate off-station continuing education is made available to the Medical and Dental staff, based on available funds, when request for education is submitted to the Medical Center Education Training and Development Committee through the service chief to the clinical subcommittee of the Medical Center Education Training and Development Committee.

Section 8. Quality Assurance/Utilization Review

It shall be the duty of each member of the active Medical and Dental staff (full time) to participate in appropriate Quality Assurance activities of the medical center.

Article IX.
Amendments

These Bylaws may be amended after submission of the proposed amendment at any regular or special meeting of the Medical Staff. To be adopted, an amendment shall require a numerical majority of the members present. Amendments so made shall be effective only when approved by the Medical Center Director.

Article X.
Review of Bylaws

These Bylaws shall be reviewed and may be revised annually.

Article XI.
Emergency Preparedness Planning
(Disaster Plan)

Reference is made to Medical Center Memorandum Memorandum [sic] 85-138-6, or updated version thereof, a detailed book-form protocol, which elaborates specifically the Medical Center emergency preparedness plan.

Article XII.
Rules and Regulations

The medical staff shall adopt such Rules and Regulations as may be necessary to implement more specifically the general principles found within these Bylaws subject to the approval of the Medical Center Director. These shall relate to the proper conduct of Medical Staff organizational activities as well as embody the level of practice that is to be required of each practitioner in the Medical Center. Such Rules and Regulations shall be a part of these Bylaws except that they may be amended or repealed at any regular meeting at which a quorum is present and without previous notice or at any special meeting as approved by the governing body.

Veterans Administration medical centers' operations are defined by legislation and regulations directed by the

Administrator. These can only be amended by Congress or the Veterans Administration Central Office. Professional guidelines are also provided by the office of the Chief Medical Director and these instructions and directives are implemented locally by Medical Center policy memoranda or cancelled. These directives cover all relevant items suggested in the "Model Rules and Regulations" published by the Joint Commission on Accreditation of Hospitals.

A copy of the Rules and Regulations affecting the Medical Staff of the Fayetteville Veterans Administration Medical Center is attached herewith.

Changes to Bylaws (dated October 16, 1986) RECOMMENDED FOR APPROVAL at a regular meeting of the Medical and Dental Staff on August 12, 1987, and RECOMMENDED FOR APPROVAL BY THE CLINICAL EXECUTIVE BOARD at a regular meeting on August 25, 1987.

JACK D. FICKEL, M.D.
Chief of Staff
Chairman, Clinical Executive Board

RECOMMEND APPROVAL OF BYLAWS as changed:

JACK D. FICKEL, M.D.
Chief of Staff

APPROVED/DISAPPROVED

DAN G KADROVACH 9/22/87
Medical Center Director

RULES AND REGULATIONS

1. The meetings of the Medical and Dental Staff shall be held on the second Wednesday of each month, at 1:30 p.m., or at the call of the Chairman.

2. The agenda at meetings shall be prepared by the Chief of Staff, to include items of medico-administrative concern, quality control, and problems relating to efficiency and adequacy of patient care. Educational and clinical items will be included when appropriate.

3. Every member of the Medical and Dental Professional Staff is expected to be actively interested in securing autopsies. No autopsy shall be performed without proper consent. All autopsies shall be performed by the Staff Pathologist. In his absence, autopsies may be performed by a designated "contract" pathologist.

4. All patients shall be attended by members of the Medical and Dental Professional Staff and shall be assigned to the service or section concerned in the treatment of the disease process which is identified.

5. All orders for treatment shall be in writing. Only qualified personnel (Nurses, Dietitians, Physical Therapists, and Pharmacists) may receive verbal or

telephone orders. The person receiving the orders will record them on the Doctor's Order Sheet, identifying them as "Verbal" or "Telephone" orders of Dr. _____ and sign as having received them. The order shall be dated and timed. The physician or dentist who issued the order will authenticate it by signing his or her signature at the earliest convenience and in all cases within 24 hours.

b. Verbal orders for leather restraints must be confirmed or cancelled within two (2) hours.

6. Mass casualty assignments for the professional staff will contain the assignment to posts, either in the Medical Center, in the auxiliary hospital, or in mobile casualty stations, and it is their responsibility to report to their assigned stations when needed. The Chief of Staff and the Medical Center Director will work as a team to coordinate activities and directions. In cases of evacuation of patients from one section of the Medical Center to another or evacuation from the premises, the Chief of Staff during the disaster will authorize the movement of patients as directed by the Medical Center Director or his designee. All policies concerning patient care will be a joint responsibility of the Chief of Staff and the Medical Center Director and in their absence the Officer of the Day will assume command until the arrival of the Chief of Staff, Director, or their designees. This plan for the care of mass casualties should be rehearsed at least twice a year by the key Medical Center

personnel.

7. Except in emergency, no patient shall be admitted to the Medical Center until a provisional diagnosis has been stated on the medical record.

8. Each patient admitted to the Medical Center shall have laboratory work as follows: urinalysis, complete blood count, and serum albumin.

9. The physician shall be held responsible for the preparation of a complete medical record for each patient under his immediate care. This record shall include identification data; chief complaints, personal history; family history; history of present illness; physical examination; treatment plan; special reports such as consultations, clinical laboratory, x-rays, and other provisional diagnosis; medical or surgical treatment or both; operative report; pathological findings; progress notes, including condition on discharge (discharge note) and final summary. Dentists will be responsible for all dental records of all patients.

10. A complete history and physical examination shall in all cases be written or dictated within 48 hours after admission of the patient, except on holidays and week-ends.

11. An adequate admission note shall include pertinent history, salient physical findings and a preliminary

diagnosis or impression. On all patients admitted after 4 PM on the last regular working day of the week and prior to 9 AM on the day prior to commencement of the ensuing regular work week, an adequate admission note shall be entered by the appropriate on-call physician. Such entry shall be made within 24 hours of the patient's admission.

12. A history and physical examination are to be recorded before the time stated for operation, except in an emergency when such delay would constitute a hazard to the patient.

13. All records are the property of the U. S. Government and shall not be removed from the premises without permission. In case of readmission of a patient all previous records on file shall be available for the use of the attending physician.

14. Free access to all medical records of all patients shall be afforded the clinical staff for *bonafide* study and research consistent with preserving the confidentiality of personal information concerning the individual patients.

15. A surgical operation shall be performed only with the consent of the patient or his legal representative. In emergencies when a patient is unable to sign or next-of-kin is not available, a consent form may be signed by the Chief of Staff or Medical Center Director in accordance with Veterans Administration Regulations.

16. *All operations performed shall be fully described by* the operating surgeon. Operative reports should be dictated or written in the medical record immediately after surgery.

17. All tissues removed at operation shall be sent to the Medical Center Pathologist who shall make such examination as considered necessary to arrive at a pathological diagnosis and the Pathologist shall sign the report. Teeth are also sent to Pathology. Those containing gold are returned to the Dental Service for proper disposition.

18. The operating surgeon shall have another qualified surgeon assisting at all major operations. Operating dentists may be assisted by a dental assistant. An operating oral surgeon will be assisted by a staff dentist.

19. Consultations

a. Required Consultations: Except in an emergency, consultation with another qualified physician or dentist is required when in the judgment of the patient's attending physician:

(1) The patient is not a good risk for operation or treatment.

(2) The diagnosis is obscure.

(3) There is doubt as to the best therapeutic measures to be utilized.

b. Consultant: A consultant must be well qualified to give an opinion in the field in which his opinion is sought. The status of the consultant is determined by the professional staff on the basis of the individual's training, experience, and competence.

c. Essentials of a consultation: A satisfactory consultation includes examination of the patient and the record. A written opinion signed by the consultant must be included in the medical record. When operative procedures are involved the consultation note, except in an emergency, shall be recorded prior to the operation.

d. Responsibility for requesting consultations: The patient's physician or dentist through the chiefs of services will make certain that members of the professional staff do not fail in providing consultations as needed.

20. Patients shall be discharged only on written order by a member of the professional staff. At time of dictating the final summary, the attending physician shall review the medical record to insure that documents therein pertain to his patient and contain accurate data. He shall review and sign the final summary.

21. All drugs used, approved by the Food and Drug Administration for Human Consumption, will be ordered by, received, stored and dispensed by Pharmacy Service in accordance with Drug Enforcement Administration and Food and Drug Administration regulations governing drugs and pharmaceuticals. Exceptions to this rule shall be well justified.

22. The following types of drugs that are ordered without time limitation of dosage shall be automatically discontinued after the duration indicated.

a. Narcotics—72 hours.

b. Anticoagulants—24 hours except for patients on long term anticoagulant therapy.

c. Sedatives and tranquilizers—30 days.

d. Antibiotics—10 days

The physician or dentist will be notified of the cancellation of a drug order.

23. If an order for a medication expires during the night it should be called to the attention of the physician or dentist the following morning or earlier should the patient's condition require additional medication.

24. Only a registered pharmacist can dispense controlled

substances.

25. Progress notes will be written at least daily on patients in the Intensive Care Unit and on Seriously Ill patients. Progress notes for other patients will be written a minimum of every other day except on weekends and holidays and when changes occur in the patients' condition, diagnosis or plan of treatment.

26. Coverage after regular Medical Center work hours, weekends and holidays, will be in accordance with Medical Center Memorandum 85-11-19, OFFICERS OF THE DAY, concerning details of MEDICAL OFFICER OF THE DAY duty.

27. These Rules and Regulations shall be reviewed and may be revised annually.

Changes to Rules and Regulations (dated October 16, 1986) RECOMMENDED FOR APPROVAL at regular meeting of the Medical and Dental Staff on August 12, 1987, and RECOMMENDED FOR APPROVAL BY THE CLINICAL EXECUTIVE BOARD at a regular meeting on August 26, 1987.

JACK D. FICKEL, M.D. 9/28/87
Chief of Staff
Chairman, Clinical Executive Board

RECOMMEND APPROVAL:
JACK D. FICKEL, M.D. 9/28/87

Chief of Staff

APPROVED
DAN G. KADROVACH 9/28/87
Medical Center Director

December 2, 1982

Chapter 4. Medical Officer of the Day

4.01 Policy

a. [Directors of medical centers will make arrangements to] provide continuous, appropriate and effective medical supervision 24 hours a day, 7 days a week.

b. In determining this pattern of medical supervision, due consideration will be given to the [type] of patients, the number of beds, [the] number and spatial relationships of buildings in the hospital complex, and all other factors relating to adequate coverage, care of patients and duties to be assigned.

[c. One or more *physicians* will be scheduled and assigned to provide medical supervision during evenings, nights, weekends and holidays when the regular medical staff is not on duty, and will serve such tours of duty as local management may specify. Physicians assigned shall

be referred to as MOD (Medical Officer of the Day). When more than one physician is scheduled to serve as MOD, specialty and/or subspecialty titles should be utilized.]

4.02 General Procedures

[a. To meet this policy requirement, the Chief of Staff will develop and issue written guidelines which will specify the authorizations, responsibilities, duties, schedules and assignments which are elements of the arrangement for providing necessary medical supervision. Procedures enumerated will include, but will not be limited to, patient care, medical evaluation, admissions to hospitals, referral of patients elsewhere, emergency/disaster procedures and adequate records and reports.

b. A report, either written or oral, will be provided to the designated physician or administrative staff member at the conclusion of the detail. Where a written report (log) is prepared by Medical Administration Service employees, the MOD may sign as concurring with this report in lieu or preparing a separate report.

c. The MOD will not leave the facility grounds during his/her tour of duty without the permission of the Chief of Staff, at which time another authorized physician will be detailed.

d. Physicians employed for the primary purpose of performing MOD duties must possess a valid medical license and be delineated appropriate clinical privileges. Only in affiliated medical centers where housestaff serve under proper supervision as part of their training experience may an unlicensed physician be authorized to serve as MOD.]

Veterans Administration Medical Center
Fayetteville, Arkansas
June 9, 1987

MEDICAL CENTER MEMORANDUM NUMBER
87-11-19

OFFICERS OF THE DAY

1. Purpose: To re-state policy and identify level of responsibility for the Medical Officer of the Day.

2. Policy: Provide an effective medical and administrative management of the medical center during assigned tour of duty which covers a full seven day period during other than regular business hours. The physician serving as Medical Officer of the Day (MOD) will provide such professional supervision as required during assigned tour of duty. The MOD will not leave the facility grounds during his/her tour of duty without the permission of the Chief of Staff, at which time another authorized

physician will be detailed.

During this tour of duty the Medical Administrative Assistant (MAA) will be the authoritative individual on administrative matters not requiring the expertise of a physician.

3. Action:

a. Designation of Medical Officer of the Day: Each day, one physician will be designated as Medical Officer of the Day to provide continuous and effective medical supervision during other than the regular work hours. Insofar as possible, all physicians so designated will be assigned an equal number of MOD tours of duty during each calendar year.

b. Orientation: Since the Officer of the Day outside of regular duty hours acts as Medical Officer in charge of the medical center, it is imperative that members of the staff serving in this capacity be properly oriented as to VA policies and procedures, and that they be familiar with policies and procedures peculiar to this medical center.

(1) The Chief of Staff will provide orientation to those physicians serving as MOD. The orientation will consist of verbal review of those VA policies and procedures pertinent to MOD duty. A file will be available to each MOD which contains copies of

local medical center policy statements and responsibilities as are related to the functions of the MOD. The Chief of Staff will assure supplemental MOD orientation, consisting of the following:

(a) Assistant Chief, Medical Service: Provide oral instruction and allow new physician staff member to participate in admission processing.

(b) Chief of Clinical Services (Medical, Surgical, Dental, Laboratory, Pharmacy, Radiology and Nursing) will provide orientation of their respective services to the new physician.

(c) Chief, Medical Administration Service, will review with the new physician the regulations pertaining to eligibility, travel, commitment, admissions, death processing, and the administrative support available though the Medical Administrative Assistants (MAA's).

c. MOD Roster: The MOD Roster will be prepared and maintained by the office of Chief of Staff, and changes to the roster must be coordinated (in writing) with the appropriate Service Chief and the Chief of Staff's Office.

(1) New full-time physicians added to the staff, who will serve as Officer of the Day, will be added to the Holiday and Extra Duty Rosters in the following

manner:

(a) Holiday Roster—New staff physician(s), full-time, who will serve as OD, will be placed at the top of the Holiday Roster and will serve as OD on the next official/VA holiday following their placement on the OD Roster.

(b) Extra Duty Roster—New staff physician(s), full-time, who will serve as OD, will be placed in appropriate numerical order on the Extra Duty Roster (example: following the last numbered physician, 17, the new physician would be 18).

d. Doctor's Orders: Doctor's Orders written by the MOD during his tour of duty shall remain in effect until changed by another physician.

e. Patient Care:

(1) The Medical Officer of the Day will serve as admitting physician in the absence from duty of the designated admitting physician. The admitting procedures endorsed by the medical center will be strictly adhered to. *All applicants for hospitalization or treatment must be seen and provided necessary examination to substantiate disposition taken.*

(2) During the absence of the ward physician, the MOD will render to the patient such care and

treatment as medically necessary.

(3) He will utilize consultative services where determined necessary for the appropriate care and treatment of the patient.

f. Blood Transfusion: The MOD will be fully aware and capable of administering the established procedures for blood transfusion. When it is necessary to determine compatibility between donors and recipients, the Laboratory Service will be summoned to perform this procedure.

g. Release of Information: Medical Center Memorandum, entitled "RELEASE OF INFORMATION," will be strictly adhered to. General information such as the fact of admission and the status of patient's condition (good, fair, serious, etc.) may be released without the prior consent of the patient. Specific details regarding a patient's condition, or any potential controversial subject, should be avoided wherever possible. Serious injuries, deaths due to accidents, or suicide occurring at this medical center will be reported immediately to the Medical Center Director or Chief of Staff, and further inquiries will be handled as they determine necessary.

h. Tour of Duty: The tour of duty of the MOD is for a 24 hour period which begins at 8:00 AM and terminates the following day at 8:00 AM. The coverage of the admission office by the MOD will be from 4:30

PM to 8:00 AM the next day, Monday through Friday, and from 8:00 AM to 8:00 AM the next day, Saturday, Sunday and holidays. The MOD whose tour of duty terminates on regular work days will report to the office of Medical Center Director at 8:00 AM to discuss the events occurring during his tour of duty. The meeting will be brief and designed to cover only matters of immediate concern. The MOD whose tour of duty ends on Saturday, Sunday, or the morning of a holiday, will report to the oncoming MOD. The MOD is required to remain at the medical center during his tour of duty.

(1) The physician acting in the capacity of MOD will be on immediate call at all times during his/her tour of duty. It is essential to respond promptly to all calls.

(2) The physician will wear the MOD's assigned pager and will respond promptly to all calls on that pager. If activity precludes immediate response he/she will have other personnel respond.

(3) The MOD will notify the Medical Administrative Assistant (MAA) of his/her whereabouts when expected to be unavailable by pager.

(4) The MOD will notify the MAA when retiring to the OD room.

i. Medical Administrative Assistant will communi-

cate with the MOD by telephone when his/her location is known. When unknown, the portable paging system will be used. If the MOD fails to respond to two pages, the house Public Address System will be used for paging purposes, regardless of the hour. If the PA System is used between 10:00 PM and 6:00 AM, the MAA will forward a Report of Contact (VAF-119) to the Chief, Medical Administration Service, delineating the facts and circumstances which required the use of the Public Address System.

j. Rest and Relaxation: The Medical Center Director is authorized to approve absence for not to exceed 24 consecutive hours for rest and relaxation for full-time physicians who have been required to serve long hours in the care and treatment of patients.

k. MOD Log Book: The book is divided into two sections, as follows:

Section I—Contains instructions and other matters of concern to the Medical Officer of the Day.

Section II—Contains copies of the VA Form 10-5 (5128), MAA Administrative Report, which are kept in the Log Book for one month for review. At the beginning of each new month, Secretary to Chief of Staff will remove the old reports and destroy them by shredding. The originals are filed in the Office of the Chief, Ambulatory Care Section of Medical

Administration Service and retained there as appropriate.

l. MOD Keys: MOD keys are the responsibility of the physician serving as MOD and are to be turned over to the succeeding physician at the conclusion of the specific tour as MOD. The loss of the MOD keys (or any of them) is to be reported to the Chief of Staff immediately upon the loss being noticed.

m. Daily Information Bulletin: A daily information bulletin is published to denote employees on an on-call status for such services as operating room, Nursing Service, Laboratory, autopsy, etc.

n. Staff Physician Duty Hours: All staff physicians should bear in mind that they are on call 24 hours a day, seven (7) days a week. A staff physician may be called for duty at any time when his/her services are needed for continued patient care.

4. References: M-2, Part I, Chapter 4, Change 67, dated 12/2/82.

5. Rescission: Medical Center Memorandum 85-11-19, dated 6/14/86.

DAN G. KADROVACH 9/28/87
Medical Center Director

Distribution: A; 1 to each physician, physician assistant, and dentist; 1 to each MAA; 1 to 136A; 1 to 136E; 12 (11).

Veterans Administration
Memorandum

Date: January 15, 1988
To: Dr. W. K. Baker, Surgical Service (112)
Thru: Chief, Surgical Service (112)
From: Medical Center Director (00)
Subj.: Assistance in caring for medical patients during the absence of Dr. Bergstrom

1. During Dr. Bergstom's extended detail to VA Central Office—Medical Service, October 26-December 11, 1987, Surgical Service staff members demonstrated excellent esprit de corps in sharing the medical center's workload of medical patients.

2. In a small hospital such as our own, it is vital that staff physicians and surgeons be team players, willing to step in and do whatever is necessary to provide top quality patient care. Surgical Service personnel proved willing and able to do just that.

3. Your cooperation and flexibility is sincerely appreciated. I want to thank you for considering yourselves as your truly are: team players first, physicians

second and surgeons third. Thank you again for a job well done.

DAN G. KADROVACH

Veterans Administration
Memorandum

Date: December 16, 1987
To: Medical Center Director (00)
THRU: Acting Associate Medical Center Director (001)
From Acting Chief of Staff (11)
Subj: Summary of events concerning E. Stanton Maxey, M.D., Staff Physician, Surgical Service and Surgical Service clinicians to see Medical Service patients.

1. Due to shortage of physician personnel on the Medical Service, assistance of the Surgical Service was requested by the Chief of Medical Service. It was requested that we loan them a physician for several weeks. After discussion with the Chief and Assistant Chief of Medical Service I offered to assist by having the Surgical Service accept the care of Medical patients equivalent to that which could be offered by one physician. This was discussed with the Surgical Service staff and all agreed cheerfully to perform this service except for E. Stanton Maxey, M. D.

2. On November 16, 1987, a memorandum was sent to all clinicians of the Surgical Service assigning them duties of accepting primary responsibility for Medical patients assigned to the Surgical Service. This was effective on that date.

3. Dr. Maxey refused to accept this assignment. On November 19, 1987, our Acting Chief of Staff, Allan Paris, Jr., D.O., sent a memorandum approving the action of the Chief of Surgical Service.

4. On November 17, 1987, Dr. Maxey had responded in writing that he would not assume care of any Medical patients partly because of possible malpractice exposure and also because Internal Medicine was not his field of expertise. As Chief of Surgical Service I explained to Dr. Maxey that this is not Internal Medicine, it is General Medicine, and all General Surgeons are qualified in this area. I again told him that consultation was available at all times and also pointed out that rounds on these patients would be made along with the Acting Chief of Medical Service on a daily basis.

5. Dr. Maxey continued to refuse care of Medical patients. Therefore, an official counseling was done on November 20, 1987, at which time it was requested that he and his attorney resolve the problem by November 23, 1987. On that date, Gordon L. Cummings, attorney for Dr. Maxey, responded by writing Dr. Maxey a letter

and sending copies to District Counsel, Congressman John Paul Hammerschmidt, Senator Dale Bumpers and Senator David Pryor. I was not given a copy of this letter and Dr. Maxey continued to refuse assigned duties.

6. On December 2, 1987, Dr. Maxey was given a letter of intent to reprimand. He responded in writing on December 7, 1987.

7. On December 6, 1987, Dr. Maxey was assigned OD duties and in that tour he apparently set out to prove that he could not handle any but Surgical patients. He called the Medical and Psychiatric on-call physicians on numerous occasions on that day which, in my opinion, was unnecessary. (Prior to this, Dr. Maxey had been able to perform OD duties satisfactorily.) He did this in a rude fashion, not speaking to the consulting physician but merely writing orders on the charts that another physician was to write the orders on these patients.

8. The letter of reprimand was prepared on December 10, 1987, and actually delivered to Dr. Maxey on December 12, 1987, at which time he reiterated that he refused to accept Medical patients and since receiving the reprimand he has done just that.

9. Because of Dr. Maxey's refusal to cooperate, and Dr. Brannon's absence due to illness, it was felt that the Surgical Service did not have enough staff to continue to routinely accept Medical Service patients and this

procedure was discontinued on December 14, 1987.

10. I might indicate, in fairness to Dr. Maxey, that he has stated at various times that he would see these patients if I re-assigned them to Surgical Service or if I changed the wording of my original memo. At the outset, three patients were in fact transferred to Surgical Service and appropriately cared for by Dr. Maxey.

11. Throughout, Dr. Maxey has performed other surgical duties well.

DAVID K. MCAFEE, M.D.

Veterans Administration
Memorandum

Date: December 29, 1987
From: Asst. Chief, Medical Service (111)
Subj: Physician Professional Standards Board
To: Chief, Medical Service (111)

1. I will be in California on Annual Leave on 12/30/87. To cancel my trip would entail considerable inconvenience and cost

2. On or about 11/13/87 While serving as Acting Chief, Medical Service, I requested assistance from the Acting Chief of Staff, Dr. McAfee, in providing additional

physician staffing for Medical Service patients because of workload related difficulties.

3. Dr. McAfee, Dr. Bergstrom and I developed a plan for medical admissions to include a rotation for Surgical Service physicians to serve as primary physician. Specific assignments were to be made by Chief, Surgical Service. It was agreed that the Medical Service would provide consultation and support in management of these patients.

4. Following initiation of this procedure I made rounds with the Surgical staff after Director's Morning Report. In my absence, rounds were provided by Dr. Daut. Physicians performing consults to the Surgical Service were also requested to provide prompt and courteous assistance in response to formal consults. Patients were seen on weekends by the physician on medical call.

5. During the period of time this was in effect Dr. Maxey continued a courteous professional contact with me. He did not *in my presence* refuse to provide care.

6. Dr. Onstine reported to me he had performed a consult on 11/13/87 on Theodore R. Baker, SSN 507-07-2094. A second consult was requested by Dr. Maxey on 11/30/87, and it was noted by Dr. Onstine that diagnostic studies he recommended on the original consult had not been requested.

7. I can be reached at phone number (415) 523-2432 in Alameda, California if further information is needed.

EVELYN R. JONES, M.D.

Veterans Administration
Memorandum

Date: November 16, 1987
From: Chief, Surgical Service (112)
Subj: Medical Patients
To: All Surgeons and Surgical P.A.

1. Effective 11/16/87, due to an excessive workload for the Department of Medicine, the Surgical Service has agreed to assist in the care of medical patients.

2. Medical patients will be admitted to Ward 3B Medicine. They will be assigned to surgical staff in rotation to include Drs. Brannon, Baker, Maxey, Husain and Alfred T. Bibby, Jr., Physician Assistant. The Surgical Service will be responsible for the care of these patients with help from the Medical Service when needed. The doctor assigned will have the primary responsibility along with the Chief of Surgery. Although these patients are officially assigned as medical patients they will be seen in our daily surgical rounds.

DAVID K. MCAFEE, M.D.

cc: Susan Cranston, R.N. THRU: Chief, Nursing Service (118)
Chief, Medical Service (111)

COMBINED SURGICAL AND ANESTHESIA STAFF MEETING MINUTES
VETERANS ADMINISTRATION MEDICAL CENTER
FAYETTEVILLE, ARKANSAS

November 16, 1987

The Surgical Service staff met at 3:00 PM in the Building I Conference Room with the following members present: Drs. Husain, Maxey, Mishra, Brannon; Ms. Sherwood, C.R.N.A.; Mr. Cranston, C.R.N.A.; Ms. Sietten. Members absent were: Dr. McAfee (AA), Dr. Baker (Excused), Mr. Bibby, P.A. (Excused); Ms. Cranston; Drs. Roberts, Dunn and Herd.

The minutes of the October 26, 1987 staff meeting were approved as published.

Surgical Service Statistics
For October 1987

Admissions	53
Discharges	50
Operations	186 (46 major, 103 minor, 117

outpatient)

General Surgery	132 Turnover Rate: 716.6	LOS: 4.6
Urology	17 Turnover Rate: 500.0	LOS: 5.9
Dental	0	

Procedures	36 (+ 10 GU Clinic)
Complications	6
% of Cases	3.2%
Deaths	1 (operative); 1 (non-operative)
Autopsy	0
Emergencies	14
OPT/NSC Visits	99

Consultations	251 (174 General Surgery, 56 Urology, 21 Orthopedic)

Dr. Brannon commented that the deaths were discussed at the Complications/Deaths Conference with Dr. Olson.

Anesthetics:

Total	226
IV	2
General	26
Local	80
Local-IV	8
IV Block	4
Spinal/Caudal	12

Topical	22
Nerve Block	1
Standby	0
Dental	71

Mr. Cranston noted that there were no anesthesia complications for the month of October. The quality and appropriateness of the anesthesia was found good upon review by the peer group.

Blood Bank Report:

No whole blood given. Red cell concentrates—surgery 39, medical 30. Patients transfused—15. Single-unit transfusions—0. Reactions—0. Expired Units—2 units fresh frozen plasma expired. Discarded Units—2 units of fresh frozen plasma thawed but not used. Fresh frozen plasma given—11 units to patient #9008 with G.I. bleeding; also received 11 units of packed cells: Dr. Baker/Dr. Daut. This patient has cirrhosis and a perirectal abscess. He was transferred to VAMC Little Rock. The committee felt that the use of FFP was justified. Crossmatch/Transfusion Ratio—surgical 2.0, medial 1.4, overall 1.7.

Infection Control Report:

There were 63 procedures classified for October. Of these 63, 4 were infected for a rate of 6.4%, year-to-date 6.4%. There were 31 clean cases with 0 infections; 16

clean contaminated cases with 2 infections for a rate of 12.5%; year-to-date 12.5%; 8 contaminated cases with 2 infections for a rate of 25%, year-to-date 25%; and 8 dirty cases with 0 infections.

There were 4 post-operative wound infections and 3 other infections, 2 respiratory and 1 urinary.

Miscellaneous Topics:

1. There were no safety hazards which needed to be brought to the attention of the Fire and Safety Committee.

2. Dr. Husain gave the chart audit report. He audited one chart from ICU and two charts from Ward 3B. All charts were found to be satisfactory.

3. Dr. Brannon mentioned that the Chief, Laboratory Service had said that because of the computer influences in the laboratory work, in the future, for pre-operative lab work you will need to request either a Profile I or a Profile II. The Profile I would be used for major operations and includes a CBC with differential, urinalysis, renal and liver screens, calcium, PTT and PT. The Profile II would be used for minor operations and includes a CBC with differential, urinalysis and PTT. Order either profile only when laboratory work is indicated for the procedure being done.

4. Mr. Cranston demonstrated the difference between a one-piece and a multi-piece single lumen subclavian catheter. Dr. Baker prefers to use the multi-piece while the other surgeons prefer the one-piece. Mr. Cranston noted that if you use the multi-piece unit then you must be sure that it is put together correctly. A recommendation was made that both the one piece Delmed I-Cath Intravenous Placement Unit with Stylet and the multi-piece Deseret Medical Eight-Inch Subclavian Jugular Catheter Set be stocked.

5. Dr. Maxey said that he had a problem with getting frozen sections done on afternoon surgery by Dr. Litton because his laboratory closes at 3:00 PM. Dr. Brannon recommended that Dr. Maxey schedule patients requiring frozen sections to be done earlier in the day.

6. Dr. Maxey questioned the memorandum from the Chief, Surgical Service dated 11/16/87 on medical patients and particularly the statement in regard to the patient being the primary responsibility of the assigned surgeon. He said that he felt he was not trained to take care of medical patients. Dr. Brannon said that medical patients would be seen on rounds every day. He further stated that Surgical Service was expanding patient care and that anytime there was a problem with responsibility he felt sure that it could be delegated.

The meeting was adjourned at 3:25 PM.

DABNEY H. BRANNON, M.D.
Acting Chief, Surgical Service

E. Stanton Maxey, M.D., F.A.C.S.
2811 Joyce Street
Fayetteville, Arkansas 72703
Telephone (501) 443 7699
November 17, 1987

David K. McAfee, M.D.
Chief Surgical Service
Veterans Administration Medical Center
Fayetteville, Arkansas

Dear Dr. McAfee:

The communication responds to your MEMORANDUM of November 10, 1987.

The assignment of medical duties to me would, when complied with, demand the exercise of medical judgments beyond my training. This caused me to seek legal advice.

Counsel suggested that the Medical Center might wish to have its own counsel review the MEMORANDUM, that the American College of Surgeons might view the assignment of medical duties to the surgical staff with disfavor, and that the exposure to malpractice litigation

under the conditions of the MEMORANDUM is very distinct.

Counsel further cautioned me to get a local attorney's opinion prior to assuming Medical Service duties here. This will require some time. Accordingly, it is the intention of this communication to request exemption from assignment to Medical Service duties until such opinion can be obtained.

Very truly yours,
E. STANTON MAXEY, M.D.

MEMORANDUM

Date: November 19, 1987
From: Chief, Surgical Service (112)
Subj: Your Letter of 11/17/87
To: E. Stanton Maxey, M.D. (112)

This is in response to your letter of 11/17/87. Attached is a copy of the memorandum dated 11/19/87, received from the Acting Chief of Staff in regard to medical duties by members of Surgical Service.

DAVID K. MCAFEE, M.D.

Veterans Administration
Memorandum

Date: November 19, 1987

To: Chief, Surgical Service (112)
From: Acting Chief of Staff (11)
Subj: Medical duties by members of Surgical Service

1. Reference is made to your memorandum of November 16, 1987, and the communication of E. Stanton Maxey, M.D., dated November 17, 1987.

2. Consistent with your memorandum, the listed surgeons and Surgical Physician Assistant will be responsible for Medical patients admitted to Ward 3B—Medicine.

3. Members of the Medical Service staff are available for consultation when needed.

ALLAN PARIS, JR., D.O.

MEMORANDUM

Date: November 20, 1987
From: Chief, Surgical Service (112)
Subj: Medical Patients
To: E. Stanton Maxey, M.D. (112)

1. My memorandum dated November 16, 1987, re Medical Patients, has been reviewed along with your reply. It is my opinion that your reasons for failure to comply are not valid and this is also the opinion of the

District Counsel.

2. I request that your attorney resolve this matter by 4:30 PM on Monday, November 23, 1987. The District Counselor is Mr. Arthur Kern. He can be reached at 370-6602 on the morning of November 23, 1987.

3. If this is not resolved to my satisfaction, appropriate action will be taken.

DAVID K. MCAFEE, M.D.

ACKNOWLEDGMENT OF RECEIPT:
E. STANTON MAXEY, M.D. 11/20/87

GORDON L. CUMMINGS
Attorney at Law
34 East Center
Fayetteville, Arkansas 72701
November 23, 1987

E. Stanton Maxey, M.D.
2811 Joyce Street
Fayetteville, AR 72703

Dear Dr. Maxey:

You have requested my legal opinion as to your potential liability for malpractice if you are forced to

participate in the new Veterans Administration hospital policy requiring that the surgical physician staff at the Fayetteville, Arkansas, V.A. Hospital assume responsibility for non-surgical medical patients admitted to Ward 3-B because of a staffing shortage at the hospital.

The Federal Tort Claims Act exempts physicians employed at V.A. hospitals from personal financial liability for malpractice claims. The U. S. Government must defend, at its own cost, any such malpractice claims, and the individual physician is immune from any and all financial liability. I can assure you that this is the law.

However, the moral rectitude and ramifications of the Veterans Administration assigning you to responsibilities which are not within your area of medical expertise, and your assumption of such responsibilities, pursuant to order of the Veterans Administration, are not covered by the Federal Tort Claims Act exempting you from financial liability.

You should consult the Code of Ethics of the American Medical Association, which forms a part of the V.A. medical staff by-laws, to make your own decision as to the morality of your carrying out such instructions.

Your legal options under the circumstances appear to be:

1. Participate in the care of medical patients you do not feel medically qualified to care for, without protest.

2. Participate under protest.

3. Resign your position.

4. Refuse to participate, be fired for such refusal, and appeal your termination of employment pursuant to applicable medical staff by-laws and other federal appeals procedures).

General Maupin Cummings (National Guard, retired) and myself, as a Marine Corps veteran of Vietnam, feel that the above policy of the V.A. Hospital in Fayetteville, Arkansas fails to meet the high standard of care owed by the government to its disabled veterans, and Congressman John Paul Hammerschmidt, Senator Dale Bumpers, and Senator David Pryor will be so informed.

Sincerely,
GORDON L. CUMMINGS

cc: Hon. John Paul Hammerschmidt
Sen. Dale Bumpers
Sen. David Pryor
Arthur Kern, V.A. Attorney

Veterans Administration
Office of District Counsel
2200 Fort Roots Drive
North Little Rock AR 72114
November 27, 1987

Mr. Dan Kadrovach (00)
Director
Veterans Administration Medical Center
1100 North College Avenue
Fayetteville, AR 72701

Subj: E. Stanton Maxey, M.D.

1. You will find attached for your information a copy of a letter received from attorney Gordon L. Cummings to E. Stanton Maxey I received recently.

2. Also attached is a letter I drafted as a response to Mr. Cummings. As the legal representative of the Veterans Administration Medical Center in this matter, I leave it to the good judgment of the "client" as to whether to send this letter. It is obviously your decision as to how, or if, any response should be made to Mr. Cummings and to our congressional representatives.

ARTHUR G. KERNS
Acting District Counsel

Report of Contact
Date of Contact 11/30/87

Dr. E. S. Maxey was counseled about caring for assigned medical patients. He refuses to do this unless I either officially transfer them to the Surgical Service or change the wording of my directive. I explained that it is the intent at this station that medical patients remain on the Medical Service. Furthermore, I believe my directive is clear and well understood by all. Dr. Maxey stated that under these circumstances he would not care for assigned medical patients. This is clearly insubordination and appropriate action is recommended.

DAVID K. MCAFEE, M.D.
Chief, Surg. Svc.

Veterans Administration
Medical Center
Fayetteville, Arkansas 72701

December 1, 1987

E. Stanton Maxey
Surgical Service (112)
VA Medical Center
Fayetteville, AR 72701

Subj: Intent to Reprimand

1. It is intended to issue a reprimand to you for the following reason:

You were instructed to provide care and assume responsibility for medical service patients. These instructions were contained in a memorandum from me to all surgeons and surgical Physicians Assistants, dated November 16, 1987. In a written statement, dated November 17, 1987, and during our conversation of November 30, 1987, you refused to follow these instructions.

2. If you believe a reprimand for the reason stated above is not warranted, you may submit a reply in writing giving your explanation and reasons for feeling a reprimand is not deserved.

3. Your reply should be addressed to the Medical Center Director (00) and routed through me. Your reply should be received not later than December 8, 1987. Your written reply will be given careful consideration in reaching a decision as to whether a reprimand is appropriate, and you will be notified of the decision.

DAVID K. MCAFEE, M.D.
Chief, Surgical Service

I have received the original and one copy of the above.

E. STANTON MAXEY 12/2/87

E. Stanton Maxey, M.D., F.A.C.S.
2811 Joyce Street
Fayetteville, Arkansas 72703
Telephone (501) 443 7699
December 7, 1987

Mr. Dan G. Kadrovach
Medical Center Director
via
David K. McAfee, M.D.
Chief, Surgical Service

Subj: Response to "Intent to Reprimand"

A reprimand directed against me is unjustified since:

A. As may be seen the November 17, 1987, letter from me to Dr. McAfee contains no refusal to follow instructions. Neither was one uttered in the referenced November 30, 1987, conversation. I did indicate that I might not want the job if the assumption of responsibilities beyond my competence was required. Putting moral concern aside, the pivotal issue is whether or not the position itself compels compliance with such instructions. Time was needed to arrive at an answer.

B. The "BYLAWS, RULES AND REGULATIONS OF MEDICAL STAFF OF VETERANS'S ADMINISTRATION MEDICAL CENTER, FAYETTEVILLE, ARKANSAS" of September 28, 1987, under Article III, Section 2, provide,

> "The Medical Staff of this Medical Center subscribes to the code of ethics of the American Medical Association, the American Osteopathic Association, and the American Dental Association."

It follows that the code of ethics of the American Medical Association is an integral component of these bylaws. Said code, the AMERICAN MEDICAL ASSOCIATION PRINCIPLES OF MEDICAL ETHICS, states in part,

> "I. A physician shall be dedicated to providing *competent* medical service with compassion and respect for human dignity." (Emphasis added.)
>
> —and—
>
> "VI. A physician shall, in the provision of appropriate patient care, except in emergencies, *be free to choose whom to serve*, with whom to associate, and the environment in which to provide medical services." (Emphasis added.)

Accordingly, these bylaws clearly confer upon me both the duty of serving only those patients whose illnesses lie within my area of competence and the prerogative for refusing to serve others.

C. The Veteran's Administration Medical Center at Fayetteville, Arkansas, through correspondence dated June 4, 1987, from its Chief, Surgical Service, solicited me for a "general surgical position." The position of "Staff Surgeon" was undertaken by me as per communication dated July 6, 1987. A post on the medical service was neither sought nor accepted. A position on the surgical staff was.

D. The Acting Chief, Surgical Service, was apprised during a November 16, 1987, meeting of the surgical staff of my lack of training in internal medicine. That this inadequacy was openly acknowledged may be seen in the minutes of that meeting. To demand that an admittedly deficient service be provided by me is quite obviously incompatible with the stated purpose of the medical staff,

> " . . . To insure . . . that all patients . . . receive care of the highest quality."

E. The Chief, Surgical Service, expressly stated in a document dated August 10, 1987, that,

> "Privileges must be requested in *all areas* that you desire to practice." (Emphasis not added.)

No privileges in internal medicine were requested. None were granted in the list attached to and a part of said document.

Additional facts could be presented. Those denoted

sufficiently proclaim that any reprimand emanating from the personnel deficiencies of the medical service would be misdirected if leveled at me.

Very truly yours,
E. STANTON MAXEY, M.D.

Veterans Administration
Medical Center
Fayetteville, Arkansas 72701

December 10, 1987

E. Stanton Maxey, M.D.
Surgical Service (112)
VA Medical Center
Fayetteville, AR 72701

Subj: Reprimand

1. Reference is made to letter of intent to reprimand, dated December 1, 1987.

2. Your reply of December 7, 1987, was carefully considered, but your explanation that "time was needed to arrive at an answer" does not justify refusing to obey a direct order. Your discussion of medical ethics was considered as well, and found to be insufficient to justify your actions.

3. Your are hereby reprimanded for the following reason:

You were instructed to provide care and assume responsibility for Medical Service patients. These instructions were contained in a memorandum from the Chief, Surgical Service to all surgeons and surgical physicians assistants, dated November 16, 1987. In a written statement, dated November 17, 1987, and during conversation with the Chief, Surgical Service on November 30, 1987, you refused to follow these instructions.

4. A copy of this reprimand will be placed in your Official Personnel Folder. This reprimand will remain in your Official Personnel Folder for three years. It may be withdrawn after two years if subsequent evaluation of your conduct is such as to warrant early withdrawl. [sic]

DAN G. KADROVACH
Medical Center Director

I have received the original and one copy of the above.
E. STANTON MAXEY, M.D. 12/13/87

Same received and an appeal will be intrumented as soon as possible.

DM&S Supplement MP-5, Part II
CHAPTER 4. PROBATIONARY PERIOD

4.01 Scope

a. This chapter contains instructions and procedures necessary to effectively implement policies prescribed in VA Manual MP-5, part II, chapter 4.

b. It applies to all probationary appointments of physicians, dentists and nurses.

4.02 References

a. 38 U.S.C. 4104(1) and 4106(b).

b. MP-5, part II, chapter 4.

c. MP-5, part II, chapters 2 and 9 and related DM&S Supplements.

4.03 Purpose of the Probationary Period

a. The probationary period is an extension of the appointment process. It provides the final test, that of actual performance on the job. During the probationary period, the employee's conduct, general character traits, and performance in the actual work situation may be closely observed, and he may be separated from the service without undue formality if circumstances so

warrant. Thus, the probationary period protects management against the retention of any person, who, in spite of having met legal and regulatory requirements for appointment, is found in actual practice to be unsuited, professionally or otherwise, for permanent appointment in the Department of Medicine and Surgery.

b. The probationary period also affords an opportunity for fostering the interest of the employee. Intelligent and considerate treatment during the probationary period will often have a lasting effect on his career. It will often save for useful and efficient service employees who would otherwise be separated, or retained in assignments in which they have little prospect of success.

c. The probationary period cannot serve as a full and fair trial period without the cooperation of supervisors at all levels. New employees, particularly those with no prior Federal service, should not be expected to immediately render the services which would normally be required of experienced and trained employees. During the initial period of employment, a sincere effort must be made by supervisors and personnel officials to orient employees into the new work situation and to provide essential training and indoctrination.

4.04 Authority and Responsibility

a. *Legal Basis.* 38 U.S.C. 4106(b) requires a 3-year probationary period during which the services of physicians, dentists and nurses shall be reviewed and the separation of those employees who are not found fully qualified and satisfactory.

b. *Individual Responsibility*

(1) *Supervisors.* Supervisors are to continually review the services of employees serving in a probationary status. Supervisors must assure by active measures that the employment record of unsatisfactory employees or of those whose services are merely borderline are promptly referred for action.

(2) *Chief of Staff.* Upon the recommendation of the service chief, the Chiefs of Staff are responsible for determining the need or a Professional Standards Board review of the services of employees at any time during the probationary period.

(3) *Professional Standards Boards.* Professional Standards Boards have the overall responsibility for reviewing the records of each employee serving a probationary period when requested by the Chief of Staff. The board will conduct such reviews as may be necessary under the circumstances and in accordance with the instructions contained in this chapter.

(4) *Personnel Officers.* They serve as technical

advisers to Professional Standards Boards. In this capacity, they have responsibility for rendering assistance and advice to members of the board in the conduct of their reviews, and for ensuring that the reviews and actions following review conform with applicable laws, VA policies and instructions.

(c) *Approval Authority for Board Action Recommendations*

(1) *Separations.* See MP-5, part II, chapter 9 and DM&S Supplement thereto.

(2) *Admonishments, Reprimands, or Retention in the Service.*

(a) Chief Medical Director for Central Office employees.

(b) Chief Medical Director or designee for employees occupying centralized positions.

(c) Field station Directors and Managers for employees occupying decentralized positions.

4.05 Types of Reviews

a. *General* There are three types of service reviews during the probationary period:

(1) *Supervisory reviews* through observation and evaluation of an employee's performance on a continuing basis.

(2) *Periodic reviews* of the services of each probational employee conducted by the chief of service and the Professional Standards Board.

(3) *Summary Reviews* conducted by Professional Standards Boards and limited to situations when summary separation from the service may be justified.

b. *Supervisory Reviews*

(1) Supervisors are to review the services of physicians, dentists and nurses on a continuing basis through observation and evaluation of their performance during the probationary period. They will be aware of their responsibilities in this connection at all times, not only from the standpoint of judging employee performance but by initially fulfilling the supervisory responsibilities of acclimating the probationary employees to their work environment; carefully explaining the nature of the duties and responsibilities of the position, together with opportunities for development; and informing employees of necessary VA policies and local regulations governing employment and conduct.

(2) After a sufficient period of time has

elapsed during which the employee has had ample opportunity to learn what is expected of him, the supervisor must then give more serious consideration to inadequacies which he may observe. It is at this point that the counseling program should be used if it is to be effective. The employee's weak points will be discussed objectively and suggestions made for the solution or elimination of such inadequacies. If his performance is considered good or outstanding in some respects, this fact also will be made known to the employee and he should be encouraged to bring all aspects of his job up to the same level. If, after subsequent counseling, the employee's adjustment and performance is not satisfactory, the service chief will recommend to the Chief of Staff, that a review of the employee's services be made by a Professional Standards Board. This will be accomplished by memorandum setting forth the specific deficiencies of the employee or the manner in which he has failed to properly adjust to his assignment, as well as a summary of the efforts of the supervisor to assist the employee, such as counseling, reassignment, etc. A special proficiency report will be prepared for the employee prior to his appearance before the Professional Standards Board unless there is a rating on record less than 3 months old.

(3) The steps necessary to separate deficient employees shall be initiated at any time during the probationary period that the need for such action becomes manifest. This is true, regardless of past or

pending proficiency ratings, counseling, or the result of any previous review which served to evaluate performance during the probationary period.

c. *Periodic Reviews*

(1) Chiefs of services and Professional Standards Boards shall have joint responsibility for periodically reviewing the services of each probationary employee. As a minimum, two reviews will be conducted during the probationary period. They will be made on the due date of the first and second proficiency rating reports. The first periodic review will ordinarily be made by the chief of service. The second such review will be made by both the chief of service and the Professional Standards Board. The chief of service and the immediate supervisor of the employee will be alerted of the due date of the review by the personnel office.

(a) The source document for these reviews will be the current proficiency rating report. However, the entire employment record will be made available to the reviewer and/or the Professional Standards Board for review.

(b) Each of these reviews will originate with the chief of service, except that in the case of nurses the Chief, Nursing Service, may designate members of her staff, preferably the immediate supervisor, to conduct the review.

(c) The proficiency rating report, related material, and any additional report which the reviewer may wish to make will be sent through channels to a Professional Standards Board for review and necessary action. (See par. 4.06a for action by board.) The services of an employee at the end of the 1st year need not be reviewed by a board unless the Chief of Staff, upon recommendation of the chief of service, requests the review.

(2) In addition to the above reviews, Professional Standards Boards shall review the services of a probational employee when necessary under circumstances stated in subparagraph b above.

(3) Central Office Professional Standards Boards shall conduct service reviews of a probational employee who is serving as Chief of Staff or Chief, Dental Service.

d. *Summary Reviews.* Field station heads or Chief of Staff will authorize Professional Standards Boards to conduct immediate reviews when circumstances may justify consideration of summary separation from the service; for example, mistreatment or abuse of patients, conduct unbecoming a Government employee, or direct disobedience. If the situation is sufficiently grave, the field station head upon the recommendation of the Chief of Staff, may suspend the employee or place him on annual leave (depending on the nature of the offense),

pending board review and final decision. However, a period of suspension may not exceed 30 calendar days without prior approval of the Chief Medical Director. [ ] Notice of any proposed suspension will be sent immediately [ ] to the Chief Medical Director. [ ] The employee will be notified of the suspension by issuance of [VA Form 5-4650,] Notification of Personnel Action. The "Remarks" space of the [form] will contain the reasons for the action and will inform the employee that he will receive separate notification of the time and date of the proposed review by a board. A copy of the suspension action [ ] will be sent to Central Office for those employees for which board action folders are maintained. (See MP-5, pt. I, ch. [293.)]

4.06 Procedure for Board Reviews

a. *General*

(1) In conducting reviews, the Professional Standards Board will have access to the entire employment record of the employee, including proficiency ratings, counseling reports, and evaluations by supervisory personnel. The board will carefully consider all aspects of the employee's service, including warning signs, such as may be evidenced by borderline proficiency ratings, either in the total element score or specific element ratings.

(2) The results of each review by the

Professional Standards Board will be processed as follows:

(a) If the employee's services are fully satisfactory or no serious deficiencies are noted, the board need not take formal board action, but may record its findings on the proficiency rating report or prepare a separate memorandum report. The employee will be informed in writing of the results of the review by his immediate supervisor. The review record and copy of the notification to the employee will be sent to the personnel office for filing in the employee's folder.

(b) If serious deficiencies are noted, the procedures outlined below will be followed.

(b) *Notice to Employee.* The employee will be notified in writing of the review by the Professional Standards Board. The letter will be prepared by the personnel office for the signature of the Chairman, Professional Standards Board, and as a minimum will contain the following:

(1) The time and date of the proposed review as well as a statement of the reasons—brief but in sufficient detail so that the employee will clearly understand why his services are considered deficient and/or the nature of the incident involved. Reference will also be made to 38 U.S.C. 4106(b).

(2) A statement that the employee may appear in person before the board to present his side of the case, or submit a written statement in his behalf. He will be told that if he elects to submit a written statement, the board's recommendation will be based solely upon a careful review and analysis of the records and facts in the case, the information furnished by the employee and others who may be called by the board.

(3) Explanation that the purpose of the board is to conduct an impartial review of his services and to make recommendations to the Chief Medical Director [ ] or field station head, as appropriate, whose decision is final.

(4) Notification that the review is being conducted during the employee's probationary period and that he has no entitlement to legal or other representation. However, upon request, he will be given assistance in preparing his case, or he may seek assistance in his behalf from within the VA.

(5) Notice that a reasonable time limitation will be set for the employee's reply as to whether or not he desires to appear before the board or submit a written statement.

c. *Conduct of Review.* The principal function of the board during the course of reviewing the services of the employee during the probationary period is to obtain all

the facts bearing upon his adjustment and performance in order to arrive at a sound recommendation. Interviews with the employee, supervisors, or others should be conducted in an informal manner. The board interviews will be held in privacy and the employee will not be present while others are being questioned. The employee or any others who may be called upon to furnish information will not be subject to cross-examination procedures and the Chairman of the Board will be responsible for monitoring the questioning to ensure that this does not occur. Questions by any members of the board should be clearly stated and should have a direct bearing on the purpose of the review. The employee will be informed to answer all questions simply and directly, and should not be permitted to digress from the subject.

(1) Oaths or affirmation will not be required nor administered in connection with the board review.

(2) The Chairman will inform the employee, if present, of the reasons for the review, the legal authority thereof, and refer to prior notice which was furnished to him.

(3) All members designated to serve on the review board will be present throughout the entire time the review is conducted.

(4) A verbatim recording need not be made

of information given during the course of the review unless, in the opinion of the Chairman, such action is necessary.

(5) The Personnel Officer (or the person acting for him) will be present to serve the board as a technical advisor.

(6) In order to obtain all of the essential facts, the Chairman may call persons who are believed to possess pertinent information about the subject employee or the circumstances which warranted the review. Persons called by the Chairman will be requested to appear before the board and answer questions. It is the duty of each employee called to furnish information freely and honestly, whether it be favorable or unfavorable to the employee whose case is under consideration, and employees will be so informed before they are interrogated.

(7) VA patients will not be called upon for information or otherwise be involved in board reviews except in those rare, extreme cases when such action is considered essential and will not be detrimental to the health and welfare of the patient or the best interest of the VA.

(8) Attendance at the review will be restricted at all times solely to those persons who, in the opinion of the Chairman, have a direct connection with

the case.

(9) Persons in a position to prejudice the action of the board may not serve as members of the board conducting the review.

d. *Recommendation of Board.* Upon completion of the board review, the board will meet in closed session to discuss its findings and arrive at an appropriate recommendation. The board may recommend any one or appropriate combination of the following—counseling, retention in the service, admonishment, reprimand, or separation. When the recommendation of the board has been reached, VA Form 10-2543, Board Action, will be completed in duplicate as follows:

(1) *Findings.* Item 8 will contain the complete details of the findings, including any reviews of the records which have been made as well as a brief but concise summary of only that information obtained through interviews determined by the board to have a direct relevancy to the service or conduct of the employee. If a verbatim recording of the interviews is made, a copy should be appended to each copy of the VA Form 10-2543 as well as to any other pertinent documents or exhibits.

(2) *Recommendation.* Item 9 will contain the specific recommendation of the board.

(3) *Conclusions.* Item 13 will contain the conclusions reached by the board which substantiate the recommendation as well as any additional pertinent remarks in support thereof.

(4) *Other Items.* All other pertinent items will be completed in the usual manner.

e. *Action by Station.* Immediately following action by the Professional Standards Board, the report of board action will be sent to the Chief of Staff, for review. He will transmit the board action together with his recommendation to the field station head. This recommendation will be developed in consultation with the chief of service. If the field station head is the approving authority for the action, he will indicate his action by completing item 17 of VA Form 10-2543. Otherwise, his comments and recommendations will be transmitted by letter, accompanied by both copies of the board action report and related material to the Chief Medical Director [ ] for approval.

f. [(Deleted by change 1.)]

g. *Action by Central Office.* For actions requiring approval of the Chief Medical Director, the Chairman, Special Boards, will authorize the appropriate Professional Standards Board in Central Office to review the case. A representative of the Personnel Service will serve the board in an advisory capacity and will provide

any technical assistance which may be required. The board will make its recommendation to the Chief Medical Director on the basis of the record, or it may call the employee or other persons for additional information prior to making final recommendation to the Chief Medical Director.

h. *Placing Approved Recommendations Into Effect:*

(1) *Separation.* See MP-5, part II, chapter 9, and related supplement, for procedures governing separation accounts.

(2) *Retention.* If the employee's retention in the service is approved, the personnel office will so notify the employee by letter over the signature of the field station head. Immediately thereafter counseling conferences will be conducted by the supervisor at necessary intervals to offer guidance and assistance to the employee with a view toward eliminating any deficiencies or inadequacies which were apparent prior to the board review. Close observation and supervision will be given the employee to ensure that his services are considered completely satisfactory prior to completion of the probationary period.

(3) *Admonishment or Reprimand.* If an admonishment or reprimand is approved, the necessary letter will be prepared by the Chief of Staff, for the signature of the field station head. The letter will be

given to the employee by his service chief, who will carefully explain the basis for the action and what the employee can do to ensure that a subsequent and more severe action will not be necessary.

4.07 Penalty Actions

a. *General*

(1) These are actions that may be imposed during the probationary period to correct an employee for a violation of a rule of conduct, law or regulation, official instruction, or specified responsibility which is not serious enough to justify separation from the service.

(2) There are two penalty actions—admonishment and reprimand.

(3) Penalty actions may be imposed as result of a review of an employee's services by a Professional Standards Board or by supervisory officials independent of board action if the violation is not serious enough to justify referral to a board for review. Referrals should not be made to Professional Standards Boards of violations which normally are the responsibility of supervisory officials.

b. *Admonishment.* An admonishment will be written. It will be prepared for the signature of the field station head when the admonishment results from a

recommendation by the Professional Standards Board subsequent to board review.

c. *Reprimand.* A reprimand will be written and prepared for the signature of the official authorized to approve penalty actions. When the reprimand results from a recommendation by the Professional Standards Board subsequent to board review, the reprimand will be prepared for the signature of the field station head.

d. *Designations of Officials to Approve Penalty Actions.* The field station head will designate officials who may admonish and reprimand employees under his jurisdiction in accordance with the following:

(1) *Admonishment.* The official who may sign a letter of admonishment will be the official who has good knowledge of the facts involved and is in the normal supervisory channels.

(2) *Reprimand.* The official who may sign a letter of reprimand will in no case be lower than a chief of service.

4.08 Action upon Completion of the Probationary Period

a. Each employee who satisfactorily completes the probationary period will automatically attain permanent status.

b. Some form of acknowledgment to those who acquire permanent status is desirable. For example, a congratulatory letter to the employee over the signature of field station head, or an item in the station's news bulletin.

c. No formal personnel action is required to confirm the completion of the probationary period.

4.09 Creditable Service

For service creditable toward completion of the 3-year probationary period, see MP-5, part II, chapter 4, paragraph 5.

Report of Contact

Date of Contact: 12/13/87 12N

Type of Contact: Personal

Dr. Maxey was given his letter of reprimand. He stated that he would fight it or any other action to the end and prove me wrong. He also said he would continue to refuse to see Medical patients.

DAVID K. MCAFEE
Chief of Surgery

E. Stanton Maxey, M.D., F.A.C.S.
2811 Joyce Street
Fayetteville, Arkansas 72703
Telephone (501) 443 7699
December 13, 1987

Mr. Dan G. Kadrovach
Medical Center Director
Veterans Administration Medical Center
Fayetteville, AR 71701

Dear Mr. Kadrovach:

Dr. McAfee gave me your reprimand today, Sunday, December 13, 1987, after an emergency laparotomy was completed.

A reprimand now, after thirty odd years of surgical practice, is simply unacceptable.

Within me is a strong belief that a peaceful path can be found which serves our mutual interests, our veterans and this facility without such dishonor. That belief leads me to request a personal interview.

Very truly yours,
E. STANTON MAXEY, M.D.

Medical Record Consultation Sheet

To: Dermatology

From: 3B-Maxey

Date of Request 12/14/87

Reason for request: Pt. thinks he may have crabs.

M Vest for Maxey

Place of Consultation: On call

Routine

Routing and Transmittal Slip
Date: 12/14/87

To: E. Stanton Maxey, M.D.

Remarks: It is my belief that any physician can diagnose and treat crabs. This consult is not indicated nor approved.

DAVID K. MCAFEE
Chief, Surgical Service

Veterans Administration Medical Center
Fayetteville, Arkansas 72701

December 15, 1987

E. Stanton Maxey, M. D.
Surgical Service
VA Medical Center
Fayetteville, AR 72701

Subj: Probationary Summary Review

1. On December 30, 1987, at 9:30 a.m., in the Conference Room in Building #4, the Physicians Professional Standard Board will conduct a summary review of your probational appointment as a physician at this medical center. This review will include consideration of the followed alledged [sic] deficiencies:

a. You were instructed to provide care and assume responsibility for Medical Service patients. These instructions were contained in a memorandum from the Chief, Surgical Service, dated November 16, 1987. In a written statement, dated November 17, 1987, and during conversation with the Chief, Surgical Service on November 30, 1987, you refused to follow these instructions. As a result, you were issued a letter of reprimand, dated December 10, 1987.

b. On December 12, 1987, you wrote orders

in the chart of patient Chester H. Browning as follows: "Trans to Med. or re-assign as Dr. Maxey does not accept responsibility for care of medical patients."

c. During a conversation with the Chief, Surgical Service on December 13, 1987, you stated that you would continue to refuse to see Medical Service patients.

These acts are in violation of VA Regulations, Section 820(B), title 38 C.F.R.

2. This review will be conducted under the provisions of 38 U.S.C. 4106(b), and in accordance with DM&S Supplement, MP-5, Part II, Chapter 4. The purpose of the Board is to conduct an impartial review and make recommendations to the appropriate approval authority whose decision is final.

3. You may appear in person before the Board to present your side of the issue, and/or you may submit a written statement in your behalf. If you elect to submit a written statement only, the Board's recommendation will be based solely upon a careful review and analysis of the records and facts in the case, the information furnished by you, and others who may be called by the Board.

4. This review is conducted during your probationary period and, under VA policy, you are not entitled to legal or other representation. Although VA policy does

not entitle you to such representation, it does not prohibit it from being granted. Accordingly, it has been decided to permit you to be represented by AFGE Local 2201 which is your exclusive representative. Such representation will be limited to assisting you in making your oral and/or written response to the Professional Standards Board concerning the reasons for this review. If you wish to be represented, please notify me no later than December 24, 1987, and, if applicable, please provide the name and title of the person who will be representing you.

5. MP-5, Part I, Chapter 297, requires the VA to make disclosure to appropriate state license boards if an employee who has been involuntarily or voluntarily separated is determined to have so significantly failed to meet generally accepted standards of clinical/professional practices as to raise reasonable concern for the safety of patient. Accordingly, it is possible that such disclosure could be made in your case if you resign pending this review, or are separated as a result.

6. You should indicate no later than close of business, December 24, 1987, as to whether you desire to appear before the Board. If you wish to submit a written statement, it must be received by me no later than close of business December 24, 1987. If you have any questions or need any assistance with regard to the board action, you may contact Mr. Jim Lee in our Personnel Office.

A. G. BRATTON, M.D., Alternate Chairman
For JOHN G. BERGSTROM, M.D.
Chairman, Ad Hod Physicians Professional Standards Board

I have received the original and one copy of the above.

E. SSTANTON MAXEY, M.D. 12/16/87

Veterans Administration Center
Fayetteville, Arkansas
May 22, 1987

Medical Center Memorandum
Number 87-11-24

Physician Professional Standards Board

1. *Purpose:* To appoint members of the Professional Standards Board and delineate its responsibilities according to VA regulations and medical center policy.

2. *Policy:* It is the policy of the VA and this medical center to have all actions involving physicians, physician assistants, and nurse anesthetists reviewed by members of this Board with appropriate recommendations to the Medical Center Director.

3. *Membership:*

a. Chairman Chief of Staff

Members: Chief, Surgical Service
Assistant Chief, Surgical Service
—Alternate
Chief Laboratory Service
Chief Medical Service, Secretary
Assistant Chief, Medical Service
—Alternate

Technical Advisor: Personnel Officer or designee

b. Physician members will deal solely with physicians.

c. Physicians to deal with nurse anesthetists; however, a staff CRNA may be an invited member when nurse anesthetist(s) are being reviewed by this Board.

d. Physicians to deal with physician assistants; however, a staff physician assistant may be an invited member when physician assistant(s) are being reviewed by this Board.

4. *Action.* Responsibilities of this Board are as follows:

a. Determine eligibilities of all applicants for appointments as physicians, physician assistants, and

nurse anesthetists under Title 38, U.S.C. 4104(1) and 4114(a), and determine whether applicants meet the requirements as set forth by law, regulation, and qualification standards. Recommendations based on conclusions of this Board will be submitted to Medical Center Director for final decision.

b. Make recommendations to Medical Center Director for promotion, special advancements for performance, and special advancements for achievement, for physicians, physician assistants, and nurse anesthetists.

c. Conduct performance review of physicians, physician assistants, and nurse anesthetists during probationary period and when any question arises concerning the professional competency of a physician, physician assistant or nurse anesthetist who has completed the probationary period. Recommendations based on conclusions of this Board will be submitted to Medical Center Director for final decision.

5. *Meetings.* The Board will meet at the call of the Chairman. All Board Actions will be prepared by the Secretary (member) for signature of each participating member as well as the Technical Advisor, for submission to the Medical Center Director for final action.

6. *References.* MP-5, Part II, Chapter 2, Change 2 (7/9/79); DM&S Supp. to MP-5, Part II, Chapter 2,

Change 34, para. 2.05.

7. *Rescission.* Medical Center Memorandum 84-11-24, dated 3/19/84.

DAN G. KADROVACH
Medical Center Director

Veterans Administration
Memorandum
Re: 564/05

Date: December 15, 1987
From: Acting Chief of Staff (11)
Subj: Physicians Professional Standards Board
To: Medical Center Director (00)
THRU: Acting Associate Medical Center Director (001/007)

1. Given the circumstances in the case of E. Stanton Maxey, M.D., and the involvement of several members of the Professional Standards Board (appointed May 22, 1987, Medical Center Memorandum 87-11-24), a temporary modification in the membership of the Professional Standards Board will be required.

2. The following Ad Hoc Physician's Professional Standards Board is recommended to provide fair and impartial consideration in the Probationary Summary

Review of E. Stanton Maxey, M.D.:

Chairman—	John G. Bergstrom, M.D.
Alt. Chairman/Member—	Albert G. Bratton, M.D.
Members	Donald W. Daut, M.D.
	John C. Gocio, M.D.

DAVID K. MCAFEE, M.D.

Approved:

DAN G. KADROVACH 12/16/87
Medical Center Director

BOARD ACTION

Employee/Applicant's Name: Edward S. Maxey, M.D.
Employee's Position: Physician
Employee's Grade and Step: Chief/Step 10
Name of Station: VAMC, Fayetteville, AR
Name of Board: Prof. Std. Board
Station of Board: VAMC, Fayetteville AR
Date: 12/30/87
Findings: See attached Findings by Professional Standards Board.

It is the unanimous conclusion of the Board that the manifestation of insubordination in this regard and the

display of failure to reasonably cooperate or use reasonable judgement [sic] in this situation are strong evidences of Dr. Maxey's inability to function in the capacity required of a V.A. physician and as such make him not fully qualified and satisfactory as a V.A. physician.

The Board recommends separation.

JOHN G. BERGSTROM, M.D. 12/30/87
Chief, Medical Service

DONALD D. DAUT, M.D. 12/30/87
Physician, Medical Service

ALBERT G. BRATTON, M.D. 12/30/87
Psychiatrist, MHC. Medical

JOHN C. GOCIO, M.D. 12/30/87
Staff Surgeon, VAMC
Little Rock, AR

Certification of initiating board technical adviser that board action is complete and has been reviewed for adherence to all legal and technical requirements before being forwarded to approving authority.

JIM LEE
Personnel Management Specialist 12/30/87

Findings—Dr. E. Stanton Maxey—12/30/87

The Ad Hoc Physicians Professional Standards Board met to conduct a Probationary Summary Review with regard to Dr. E. Stanton Maxey. This review was conducted under the provisions of 38 U.S.C. 4106(b) and in accordance with DM&S Supplement, MP-5, Part II, Chapter 4.

Dr. McAfee, Chief, Surgical Service testified that:

- the decision to accept medical patients on surgery with ongoing medical consultation and review was discussed with staff and accepted by all but Dr. Maxey;
- his non-compliance was based specifically on his training, yet what was requested was the evaluation and management of patients—expectations that are made of all physicians and surgeons regardless of the categorical "labeling" of the patient—indeed Dr. Maxey stated he would accept these same patients if they were admitted with "label" of surgical patient;
- in detailing his objection to counsel and in response, Dr. Maxey did not detail that ongoing medical consultation was available and daily rounds by Medical Service were performed in consult with Surgical Service and that complex medical problems were immediately transferred to a Medical Service physician;
- after formal reprimand for refusing to comply with a

direct order from his Service Chief, Dr. Maxey entered an order on a patient's record to transfer the patient to Medical Service as "Dr. Maxey does not assume responsibility for Medical Service patients;" and

- Dr. Maxey, while subsequently serving as O.D., wrote orders on all medical admissions to have medical consultant see and write orders without full evaluation of these patients and discussing the problems with the Medical Service O.D.

Dr. Edward S. Maxey was represented by Mr. Gary Blevins, Union Representative, who:

- requested he be present for the entire Board proceedings—refused;
- challenged as to whether or not the probationary period had been waived as the commencement date was not noted on S.F. 50 executed by Big Springs, Texas VAMC;
- asserted that Dr. Maxey's duties of employment were changed without negotiation; i.e., providing "medical care rather than specific surgical care;"
- that in his letter of November 17, 1987, Dr. Maxey had not specifically refused to provide care to medical patients;
- stated that the reprimand did not respond to his response to the intent to reprimand; and
- stated that to terminate an employee reprimanded would be double punishment.

Statements from Dr. Evelyn Jones and Dr. Robert Manning attesting to the proposed cross-coverage and Dr. Maxey's orders for medical consultation without evaluation and discussion were reviewed.

The Board finds in November, 1987, because of an extremely heavy Medical Service patient load, the Surgical Service Chief, Dr. David McAfee, agreed to help with these patients. It was understood that at anytime a physician felt uncomfortable with a patient's "Diagnosis and/or Treatment," consultation would be made with the Medical Service and the patient's care would be looked after—either on a consultant basis and/or complete takeover of the patient's care by the Medical staff.

Dr. Maxey could not accept this temporary arrangement and openly demonstrated this. Dr. Maxey, probably meaning well, could not cooperate with the VA Medical staff and has remained quite rigid in his subsequent actions.

Working for the VA system and within a VA hospital, caring for veterans, requires cooperation and adaptability. Dr. Maxey refused this needed "cooperation-adaptation," as is demonstrated in the recorded incidents, orders, etc.

Evidence was presented to the Board that Dr. Maxey performed well in his surgical specialty until he was

asked to participate with other members of the Surgical staff, by his Chief, in taking care of general medical patients to aid Medical Service in their care of these patients. Dr. Maxey protested this order by refusing to care for such patients, as per his order in the chart, as well as other patients identified by his Chief.

It is duly noted that Dr. Maxey had done general medical duties on the Surgical Service prior to this time, by taking care of patients with general medical problems and up until this time and had done the same during his O.D. duty.

Given hospital surgical privileges as a provision of being hired into the V.A. system and that physician choice of patients to be served included *all* V.A. patients, not those selected by the individual physician.

His M.O.D. duties included providing general medical care during these times and he was not asked to perform at the level of an internist, and always had access to an internist if the need arose. According to documentation provided this Board, there was a definite change in Dr. Maxey's action towards carrying out his orders and in providing patient care after the incident of his Chief's directive. He no longer performed as a team member in the best interests of the patients he served. His actions were potentially actions of patient abandonment and were not in the interests of good patient care. There was adequate evidence that Dr. Maxey had been counseled

by his Chief prior to calling for Board action, and he did not change his behavior.

The evidence shows refusal to follow a directive of the Chief of the Service which was approved by the Veterans Administration superiors in command at the Fayetteville, Arkansas VA Medical Center. The lack of confidence by his Chief of Service in his ability to perform with a spirit of cooperation and professional attitude required as a physician in the Veterans Administration.

The opinion of his Chief of Service that he was insubordinate and failed to carry out required and requested service and was unreasonable and obstructive in this regard. The supposition of the rights and privileges of a Veteran's Administration physician shown by Dr. Maxey has great potential for abuse of the smooth and satisfactory functioning of the Veteran's Administration Medical Center and medical care system and its care of veterans.

It is the understanding of the Board of Review that physicians who accept employment by the Veteran's Administration agree to comply with guidelines, requests and directives of the Service Chief and Veteran's Administration as a whole and that in this case the directive was reasonable and appropriate in its scope and nature. Dr. Maxey signed on as a V.A. physician with privileges to do surgery. The evidenced obstructive and

unreasonable attitude in the way he handled the request to perform in a temporary nature additional duties to alleviate the workload problems related to general medical patients was unacceptable. This is within the scope of a qualified and trained general surgeon and was reasonable in the circumstance. In addition, adequate back-up appears to have been provided with the option of continuing or not continuing primary care, adequate evaluation and adequate communication with consultants.

American Federation
Of Government Employees
1100 North College Avenue
Fayetteville, Arkansas 72701
443-4301

To whom it may concern:

I designate Mr. Gary Blevins, President of Local Union 2201, as my personal representative and authorize him to review and copy documents in my personnel folder.

E. STANTON MAXEY, M.D.
12/21/87

E. Stanton Maxey, M.D., F.A.C.S.
2811 Joyce Street
Fayetteville, Arkansas 72703
Telephone (501) 443 7699
December 20, 1987

John G. Bergstrom, M.D.
Chairman, Ad Hoc
Physicians Professional Standards Board

Dear Dr. Bergstrom:

Enclosed please find xerox copies of a) letter of appointment, b) *permanent* appointment notification and c) Standard Form 50-b. You will see that the first of these makes no mention of a probationary period. You will also see that the second specifically mentions the position of "Staff Surgeon" (rather than physician) and "Full Time Permanent, Excepted" (rather than a probationary appointment). And you will see that the third has a " . . . 2 YEAR PROBATIONARY PERIOD COMMENCING * 00-00-00" (long hence expired). Accordingly, no probationary period was involved in my appointment and your letter referencing a "Probationary Summary Review" can not properly apply to me.

No request to attend patients admitted to the surgical service has been refused. I have, as authorized by our bylaws, refused to assume responsibility for patients admitted to the medical service. Surgical consultation for

patients so admitted has never been refused.

Some patients initially admitted to the medical service were quickly seen by me when transferred to the surgical service. This demonstrates that the administration of this facility could have me attend any patient it wished either by the simple expedient of requesting a consultation or by placing said patient on the surgical service.

Dr. McAfee was informed during the referenced December 13, 1987, conversation that I would happily see the patient then in question if he, Dr. McAfee, would transfer him to the surgical service.

As you know, annual leave has been granted to me for the period December 26, 1987-January 1, 1988. I will, as a full time permanent staff surgeon, be happy to speak with you informally or appear before any committee before or after this period.

I have asked Mr. Gary Blevins of AFGE Local 2201 to attend your December 30, 1987, meeting in my behalf.

Very truly yours,
E. Sstanton Maxey, M.D.

American Federation
Of Government Employees
1100 North College Avenue
Fayetteville, Arkansas 72701
443-4301

December 24, 1987

John G. Bergstrom, M.D.
Chairman, Ad Hoc
Physicians Professional Standards Board

Request to Reschedule the Probationary Summary Review for Dr. Maxey Scheduled for 12/30/86.

1. We request to reschedule the Probationary Summary Review for Dr. E. Stanton Maxey scheduled for 12/30/87. Dr. Maxey is on annual leave for the period December 26, 1987-January 1, 1988 and would be unable to represent himself during this review of his conduct on the date originally scheduled.

2. Thank you for your consideration in this matter.

GARY BLEVINS
President, Local 2201

American Federation
Of Government Employees
1100 North College Avenue
Fayetteville, Arkansas 72701
443-4301
December 29, 1987

Mr. John Bergstrom, M.D.
Chairman, Ad Hoc
Physicians Professional Standards Board

Representational Rights

1. We request to be present through all of the proceedings of the Probationary Summary Review of E. Stanton Maxey, M.D. on December 30, 1987 as representative of A.F.G.E. Local 2201.

2. This request is pursuant to Public Law 95-454, §7114, (a), (2), (A) and any and all other applicable sections of this law.

3. Thank you for your consideration in this matter.

GARY BLEVINS
President, Local 2201

Note: Mr. Gary Blevins was afforded the opportunity to speak on behalf of Dr. Maxey as his representative. There were no other unit employees present during the

Boards Review.

JIM LEE 12/30/87

Veterans Administration Medical Center
Fayetteville, Arkansas 72701

December 29, 1987

President, AFGE Local 2201
VA Medical Center
1100 N. College Avenue
Fayetteville, AR 72701

Subj: Probationary Review Meeting

1. Dr. E. Stanton Maxey was notified on December 15, 1987, that the Review Board was meeting December 30, 1987. Arrangements were made at that time for Dr. Gocio to have patients rescheduled so he could attend this review.

2. In Dr. Maxey's letter of December 20, 1987, received by me December 24, 1987, he stated that you would meet with the Review Board in his behalf. You will be called to testify in Dr. Maxey's behalf so please make yourself available on December 30. You may be asked questions, you may read a statement or both. You will be allowed to meet with the board at our request, but not during the

entire proceedings.

JOHN G. BERGSTROM, M.D.
Chairman, Ad Hoc Physicians Professional
Standards Board

Veterans Administration Medical Center
Fayetteville, Arkansas 72701

December 29, 1987

E. Stanton Maxey, M.D.
2811 Joyce Street
Fayetteville, AR 72701

Subj: Probationary Summary Review

The following information amends and replaces paragraph 2 of the letter from me, dated December 15, 1987, subject Probationary Summary Review:

> 2. Section 4106(b) of Title 38 U.S. Code, provides that an employee appointed under 38 U.S.C. 4104(1) and found not fully qualified and satisfactory by a Probationary Review Board shall be separated. In *Giordano vs Roudebush*, 617 F.2d 517, the U.S. Eighth Circuit Court rules that the findings, whether for retention or separation, of a Probationary Review Board is not subject to

further administrative review. Since this medical center is in the Eighth Circuit, we must comply with this decision. Therefore, the administrative review procedures as outlined in DM&S Supplement, MP-5, Part II, Chapter 4, concerning administrative actions on Board findings and recommendations do not apply to Probationary Review Boards at this medical center. Instead, if the Board conducting the Probationary Review finds that the employee is not fully qualified and satisfactory, the employee must be separated. If the Board finds the employee fully qualified and satisfactory, the employee will be retained.

JOHN G. BERGSTROM, M.D.
Chairman, Ad Hoc Physicians
Professional Standards Board

I have received the original and one copy of the above.

E. STANTON MAXEY, M.D. 12/29/87
17:27 hrs.

Veterans Administration

MEMORANDUM

Date: December 6, 1987
From: Robert J. Manning, M.D. (111A)

Subj: Medical On-call on Sunday 12/6/87
To: Chief of Staff (11)
Thru: Chief Medical Service (111)

1. After making medical rounds on the ICU patients and seriously ill medical patients and any other medical patients that the nurses wanted me to see, I left the hospital approximately 12:10 p.m. today. I was called back at 3:30 p.m. by the hospital operator and told I was wanted in the ICU *STAT.* I called back to the hospital to the ICU and asked the nurse what was going on and she said they were having a code blue and that the OD (Dr. Maxey) wanted me to come over. At this point I got in my car and drove to the hospital and went to the ICU and helped try to resuscitate a ------ -SS# 8964 in bed 2 of the ICU. This unfortunate gentleman had either extended his myocardial infarction or ruptured his left ventricle from previous myocardial infarction and was in cardiogenic shock without pulse or blood pressure in spite of a dopamine drip. After about 10 minutes it became obvious that the poor gentleman was non-resuscitable. His pupils were fixed and dilated and he was finally pronounced dead at 3:51 p.m.

2. At this point I was told by one of the head nurses that they wanted me down on 2A since the OD (Dr. Maxey) had written an order into a new admission's chart for the medical on-call doctor to see a patient for the purposes of writing "medical orders" on the patient. The ----- gentleman was ------ (0922). I then

went to see ––––– and at that time he was asymptomatic but he had been transferred in from a hospital in Siloam Springs where he had gone previously today complaining of severe shortness of breath (in retrospect probable angina equivalent). The nurse asked if I wanted the cardiac enzymes which Dr. Maxey had written, done STAT since she didn't think it made any sense to write cardiac enzymes to be drawn tomorrow morning. I said yes and wrote the order for such. I then went to see the gentleman and listened to his chest. He was breathing well at that time without distress and was asymptomatic. I then wrote all of the indicated cardiac medications (most of which he had been on previously) and turned these orders in to the nurse.

3. I was then told by the nurse that they "wanted me down on 1A." When I went down to 1A the nurse told me that there was an order written by the OD (Dr. Maxey) for either the psychiatrist or the medical on-call doctor to come in and write medication orders for two recent admissions, both essentially asymptomatic. One was a 32 year old fellow ––––– (2279) who was just admitted for drinking and was not tremulous and in no signs of alcohol withdrawal syndrome. I simply ordered some oral thiamine and some oral prn vistaril for any possible anxiety after seeing him. The next gentleman was ––––– (5933) and the OD (Dr. Maxey) had written orders to contact psychiatrist or medical on-call doctor about writing the medical orders after his admission. He was essentially asymptomatic and had a

history of manic-depressive illness and had been off all of his medication for at least a couple of weeks. At that time he was asymptomatic and I elected to simply write an order for oral vistaril prn anxiety to hold the gentleman over until tomorrow when he could be seen by the psychiatrist.

4. I then left the hospital and attended the remainder of the distaffers party given in Dr. Wu's home and upon arrival home at 7:15 p.m. there was a message waiting that I had been called by the nurse on 2A about the second patient mentioned −−−−−. They told me that his cardiac enzymes were elevated and that his total CPK was over 400 and that his MB fraction was greater than 40, indicative of a probable myocardial infarction. At this point I came into the hospital and wrote orders to transfer −−−− to the ICU for observation for probable myocardial infarction (standard protocol orders) and rewrote all the medication orders which I had written previously for the new assignment. An order had been written in the chart by the OD (Dr. Maxey) to notify the medical on-call doctor regarding the patient's elevated cardiac enzymes.

ROBERT J. MANNING, M.D.

Medical Record

Progress Notes

12/12/87

Patient now indicated he's had intermittent hemoptysis over many years. Last episode was last Wednesday. On exam here no distinct lung pathology though BS distant. ABD MOD MID epigast tenderness. Good faint post tibial pulses. No RT dorsalis pedis. Will sign off this pt. as I'm not accepting responsibility for care of medical patients.

E. MAXEY

Medical Record
Consultation Sheet

To Medical Service
From Dr. Maxey 3B
Date of Request 12/11/87

Reason for Request:

1. Bronchitis

2. Medications for same

3. Transfer to Medical service if appropriate.

Bradley for Dr. Maxey

Consultation Report 12/14/87

Patient already reassigned to Baker.

10 a.m.

Medical Record
Doctor's Orders

12/12/87 Transfer to Med. or re-assign as Dr. Maxey does not accept responsibility for care of Medical patients.

E. MAXEY

Bunch, Ralph Jr. #4671

Adamson, Ray F. #7059

Adm. 12/10/87 refused.

Maxey Refused to accept.

12/9/87

Anderson, Roscoe #7921

Maxey refused.

Veterans Administration

MEMORANDUM

Date: 12-9-87
From: A. G. Bratton, M.D., Chief, M.H.C.
Subj: Dr. Maxey's On Call Duty 12-6-87
To: David McAfee, M.D., Chief, Surgery Service

The following individuals were admitted on 12-6-87 by Dr. Maxey with orders to call M.O.D. or Psychiatrist O.D. for orders:

Allenger, Robert 1-A
Tinomen, Clarence 1-A
Martin, Kieth 1-A

Veterans Administration
Medical Center
Fayetteville, Arkansas 72701
January 5, 1988

E. Stanton Maxey, M.D.
Surgical Service (112)
VA Medical Center
Fayetteville, AR 72701

Subj: Separation During Probationary Period

1. An Ad Hoc Physician's Professional Standards Board conducted a Probationary Summary Review on December 30, 1987, and found that you are not fully qualified and satisfactory for continued Federal employment as a Physician. The Board has recommended your separation. Under the U.S. Eighth Circuit ruling, this decision is not subject to further review and is final.

2. This is to notify you that you will be separated effective January 15, 1988.

3. You should contact the Surgical Service Office for information regarding station clearance procedures. If you have any questions regarding this notice, you may contact our Personnel Office.

DAN G. KADROVACH
Medical Center Director

I have received the original and one copy of the above. I have also received two copies of the Board Action & Findings provided by the Board.

MAXEY, M.D. 1/7/88

Veterans Administration

Memorandum
Date: November 20, 1987
From: Dr. Paris
Subj: Dr. Maxey
To: Mrs. Cassidy (Message dictated)

1. Asked McAfee this morning if Maxey has yet refused to see medical patients.

2. McAfee unsure; advised he would check and act if Maxey refused.

3. McAfee agreed, noting it would be "demoralizing" to the rest of the surgical staff if Maxey got away with insubordination.

4. McAfee thought suspension was first step in discipline; reminded him that admonishment was correct first response. Suggested he check the Medical Center Memorandums.

5. McAfee suggested Maxey have his attorney check with Arthur Kerns.

ALLAN J. PARIS, JR.

Veterans Administration
Medical Center
Fayetteville, Arkansas 72701

December 1, 1987

E. Stanton Maxey
Surgical Service (112)
VA Medical Center
Fayetteville, AR 72701

Subj: Intent to Reprimand

1. It is intended to issue a reprimand to you for the following reason:

You were instructed to provide care and assume responsibility for medical service patients. These instructions were contained in a memorandum from me to all surgeons and surgical Physicians Assistants, dated November 16, 1987. In a written statement, dated November 17, 1987, and during our conversation of November 30, 1987, you refused to follow these instructions.

2. If you believe a reprimand for the reason stated above is not warranted, you may submit a reply in writing giving your explanation and reasons for feeling a reprimand is not deserved.

3. Your reply should be addressed to the Medical Center Director (00) and routed through me. Your reply should be received not later than December 8, 1987. Your written reply will be given careful consideration in reaching a decision as to whether a reprimand is appropriate, and you will be notified of the decision.

DAVID K. MCAFEE
Chief, Surgical Service

I have received the original and one copy of the above.

E. STANTON MAXEY 12/2/87

Constitutional and Statutory Provisions Involved

Constitution of the United States

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency actions, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. 3706

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42 USCS §§11111-11152

§11111. Professional Review

(a) In general. (1) Limitation on damages for professional review actions. If a professional review action (as defined in section 431(9) [42 USCS §11151(9)]) of a professional review body meets all the standards specified in section 412(a) [42 USCS §11112(a)], except as provided in subsection (b)—

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, 15 U.S.C. 15C, where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies. Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception. If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 423(a) [42 USCS §11133(a)], the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 423(a) [42 USCS §11133(a)], the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws. (1) Professional review actions taken on or after October 14, 1989. Except as provided in paragraph (2), subsection (a) shall apply to State Laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions. (A) State early opt-in. Subsection (a) shall apply to State laws in a State for actions commenced before October 14, 1989, if the State by legislation elects such treatment.

(B) State opt-out. Subsection (a) shall not apply to state laws in a State for actions commenced on or after October 14, 1989, if the State by legislation elects such treatment.

(C) Effective date of election. An election under State law is not effective, for purposes of subparagraphs (A) and (B) for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

§11112. Standards for professional review actions

(a) In general. For purposes of the protection set forth in section 411(a) [42 USCS §11111(a)], a professional review action must be taken—

(1) in the reasonable belief that the action was in the furtherance of quality health care.

(2) after a reasonable effort to obtain the facts of the matter.

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) In the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 41(a) [42 USCS §11111(a)] unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing. A health care entity is deemed to have met the adequate notice and hearing

requirement of subsection (a)(3) with respect to a physician if the following conditions are met (or are waived voluntarily by the physician:

(1) Notice of proposed action. The physician has been given notice stating—

(A)(i) that a professional review action has been proposed to be taken against the physician.

(ii) reasons for the proposed action.

(B)(i) that the physician has the right to request a hearing on the proposed action.

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing. If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

(A) the place, time, and date, of the hearing, which date shall fall not less than 30 days after the date of notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice. If a hearing is requested on a timely basis under paragraph (1)(b)—

(A) subject to subparagraph (B), the hearing

shall be held (as determined by the health care entity)—

(i) before an arbitrator mutually acceptable to the physician and the health care entity.

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right—

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses.

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing, and

(D) upon completion of the hearing, the physician involved has the right—

(i) to receive the written recommendation of the arbitor, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3).

(c) Adequate procedures in investigations or health emergencies. For purposes of section 411(a), nothing in this section shall be construed as—

(1) requiring the procedures referred to in subsection (a)(3)—

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

§11113. Payment of Reasonable Attorneys' Fees and Costs in Defense of Suit.

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 412(a) [42 USCS §1112(a)] and the defendant substantially prevails, the court ~~shall~~, at the conclusion of the action, award to a substantially prevailing party defendant against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed with the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

§11114 Guidelines of the Secretary.

The Secretary may establish, after notice and opportunity for comment, such voluntary guidelines as may assist the professional review bodies in meeting the standards described in 412(a) [42 USCS §11112(a)]

§11115 Construction

(a) In general. Except as specifically provided in this part [42 USCS §§11111 et seq.], nothing in this part [42 USCS §§11111 et seq.] as changing the liabilities or immunities under the law.

(b) Scope of clinical privileges. Nothing in this part [42 USCS §§11111 et seq.] shall be construed as requiring

health care entities to provide clinical privileges to any or all classes or types of physicians or other licensed health care practitioners.

(c) Treatment of nurses and other practitioners. Nothing in this part [42 USCS §§11111 et seq.] shall be construed as affecting, or modifying any provision of Federal or State law, with respect to activities of professional review bodies regarding nurses, other licensed health care practitioners, or other health professionals who are not physicians.

(d) Treatment of patient malpractice claims. Nothing in this title [42 USCS §§11110 et seq.] shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defenses or immunities available to any physician, health care practitioner, or health care entity.

Reporting of Information

§11131. Requiring reports on medical malpractice payments

(a) In general. Each entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise in settlement (or partial settlement) of, or in satisfaction of a judgment in, a medical malpractice action or claim shall report, in accordance with section 424 [42 USCS §11134]

information respecting the payment and circumstances thereof.

(b)Information to be reported. The information to be reported under subsection (a) includes—

(1) the name of any physician or licensed health care practitioner for whose benefit the payment is made,

(2) the amount of the payment,

(3) the name (if known) of any hospital with which the physician or practitioner is affiliated or associated,

(4) a description of the acts or omissions and injuries or illnesses upon which the action or claim was based, and

(5) such other information as the Secretary determines is required for appropriate interpretation of information reported under this section.

(c) Sanctions for failure to report. Any entity that fails to report information on a payment required to be reported under this section shall be subject to a civil monetary penalty of not more than $10,000 for each such payment involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1128A of the Social Security Act are imposed an collected under that section.

(d) Report of treatment of small payments. The Secretary shall study and report to Congress, not later than two years after the date of the enactment of this Act [enacted Nov. 14, 1986], on whether information

respecting such payments should continue to be required to be reported under subsection (a) and whether information respecting all claims made concerning a medical malpractice action should be required to be reported under such subsection.

§11132. Reporting of Sanctions Taken by Board of Medical Examiners

(a) In general. (1) Actions subject to reporting. Each Board of Medical Examiners—

(A) which revokes or suspends (or otherwise restricts) a physician's license or censures, reprimands, or places on probation a physician, for reasons relating to the physician's professional competence or professional conduct, or

(B) to which a physician's license is surrendered, shall report, in accordance with section 424 [42 USCS §11134] the information described in paragraph (2)

(2) Information to be reported. The information to be reported under paragraph (1) is—

(A) the name of the physician involved,

(B) a description of the acts or omissions or other reasons (if known) for the revocation, suspension, or surrender of license, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Failure to report. If, after notice of noncompliance

and providing opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (a), the Secretary shall designate another qualified entity for the reporting of information under section 423 [42 USCS §11133].

§11113. Reporting of Certain Professional Review Actions Taken by Health Care Entities

(a) Reporting by health care entities. (1) On physicians. Each health care entity which—

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician—

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society,

shall report to the Board of Medical Examiners, in accordance with section 424(a), the information described in paragraph (3).

(2) Permissive reporting on other licensed health care practitioners. A health care entity may report to the Board of Medical Examiners, in accordance with section 424(a) [42 USCS §11134(a)], the information described in paragraph (3) in the case of a licensed health care practitioner who is not a physician, if the entity would be required to report such information under paragraph (1) with respect to the practitioner if the practitioner were a physician.

(3) Information to be reported. The information to be reported under this subsection is—

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action, or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Reporting by Board of Medical Examiners. Each Board of Medical Examiners shall report, in accordance with section 424 [42 USCS §11134] the information reported to it under subsection (a) and known instances of a health care entity's failure to report information under subsection (a)(1).

(c) Sanctions. (1) Health care entities. A health care entity that fails substantially to meet the requirement of subsection (a)(1) shall lose the protections of section 411(a)(1) [42 USCS §11111(a)(1)] if the Secretary

publishes the name of the entity under section 411(b)

(2) Board of Medical Examiners. If, after notice of noncompliance and providing an opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (b), the Secretary shall designate another qualified entity for the reporting of information under subsection (b).

(d) References to Board of Medical Examiners. Any reference in this part [42 USCS §§1113 et seq.] to a Board of Medical Examiners includes, in the case of a Board in a State that fails to meet the reporting requirements of section 422(a) or subsection (b) [42 USCS §11113(a), (b)], a reference to such other qualified entity as the Secretary designates.

§11134. Form of reporting

(a) Timing and form. The information required to be reported under sections 421, 422(a), and 423 [42 USCS §§11131, 11132(a), 11133] shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall first be required to be reported on a date (not later than one year after the date of the enactment of this Act [enacted Nov. 14, 1986]) specified by the Secretary.

(b) To whom reported. The information required to be reported under sections 421, 422(a) and 423(b) [42 USCS §§11131, 11132(a), 11133(b)] shall be reported to the Secretary, or, in the Secretary's discretion, to an

appropriate private or public agency which has made suitable arrangements with the Secretary with respect to receipt, storage, protection of confidentiality, and dissemination of the information under this part [42 USCS §§111131 et seq.].

(c) Reporting to State licensing boards. (1) Malpractice payments. Information required to be reported under section 421 [42 USCS §11131] shall also be reported to the appropriate State licensing board (or boards) in the State in which the medical malpractice claim arose.

(2) Reporting to other licensing boards. Information required to be reported under section 423(b) [42 USCS §11133(b)] shall also be reported to the appropriate State licensing board in the State in which the health care entity is located if it is not otherwise reported to such board under subsection (b).

§11135. Duty of hospitals to obtain information

(a) In general. It is the duty of each hospital to request from the Secretary (or the agency designated under section 424(b) [42 USCS §11134(b)(D)], on and after the date information is first required to be reported under section 424(a) [42 USCS §11134(a)]—

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital, information reported under this part [42 USCS §§11131 et seq.] concerning the physician or practitioner, and

(2) once every 2 years information reported under this part [42 USCS §§11131 et seq.] concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges, at the hospital.

A hospital may request such information at other times.

(b) Failure to obtain information. With respect to a medical malpractice action, a hospital which does not request information respecting a physician or practitioner as required under subsection (a) is presumed to have knowledge of any information reported under this part to the Secretary with respect to the physician or practitioner.

(c) Reliance on information provided. Each hospital may rely upon information provided to the hospital under this title [42 USCS §§11101 et seq.] and shall not be liable for such reliance in the absence of the hospital's knowledge that the information provided was false.

§11136. Disclosure and correction of information

With respect to the information reported to the Secretary (or the agency designated under section 424(b) [42 USCS §111134(b)] under this part [42 USCS §§11131 et seq.] respecting a physician or other license health care practitioner, the Secretary shall, by regulation, provide for—

(1) disclosure of the information, upon request, to the physician or practitioner, and

(2) disclosure in the case of disputed accuracy of the information.

§11137 Miscellaneous provisions.

(a) Providing licensing boards and other health care entities with access to information. The Secretary (or the agency designated under section 424(b) [42 USCS §§11134(b)]) shall, upon request, provide information reported under this part with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

(b) Confidentiality of information. (1) In general. Information reported under this part [42 USCS §§11131 et seq.] is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 425 [42 USCS §§11135(b), (c)] (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a). Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this part [42 USCS §§11131 et seq.] that is in a form that does not permit the identification of any particular health care entity, physician, other health care provider,

or patient shall not be considered confidential. The Secretary (or other agency designated under section 424(b) [42 USCS §11134(b)], on application by any person, shall prepare such information in such form and shall disclose such information in such form.

(2) Penalty for violations. Any person who violates paragraph (1) shall be subject to a civil money penalty of not more than $10,000 for each such violation involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1128A of the Social Security Act are imposed and collected under that section.

(3) Use of information. Subject to paragraph (1), information provided under section 425 [42 USCS §§11135] and subsection (a) is intended to be used solely with respect to activities in the furtherance of the quality of health care.

(4) Fees. The Secretary may establish or approve reasonable fees for the disclosure of information under this section or section 426 [42 USCS §§11136]. The amount of such a fee may not exceed the costs of processing the requests for disclosure and of providing such information. Such fees shall be available to the Secretary (or, in the Secretary's discretion, to the agency designated under section 424(b) [42 USCS §§11134(b)]) to cover such costs.

(c) Relief from liability for reporting. No person or entity (including the agency designated under section 424(b) [42 USCS §§11134(b)]) shall be held liable in any

civil action with respect to any report made under this part [42 USCS §§11131 et seq.] (including information provided under subsection (a)) without knowledge of the falsity of the information contained in the report.

(d) Interpretation of information. In interpreting information reported under this part [42 USCS §§11131 et seq.], a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred.

§11151. Definitions

In this title [42 USCS §§11101 et seq.]:

(1) the term "adversely affecting" includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

(2) The term "Board of Medical Examiners" includes a body comparable to such a Board (as determined by the State) with responsibility for the licensing of physicians and also includes a subdivision of such a Board or body.

(3) The term "clinical privileges" includes privileges, membership on the medical staff, and other circumstances pertaining to the furnishing of medical care under which a physician or other licensed health care practitioner is permitted to furnish such care by a health care entity.

(4) (A) The term "health care entity" means—

(i) a hospital that is licensed to provide

health care services by the State in which it is located,

(ii) an entity (including a health maintenance organization or group medical practice) that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care (as determined under the regulations of the Secretary), and

(iii) subject to subparagraph (B), a professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary).

(B) The term "health care entity" does not include a professional society (or committee thereof) if, within the previous 5 years, the society has been found by the Federal Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

(5) The term "hospital" means an entity described in paragraphs (1) and (7) of section 186(e) of the Social Security Act.

(6) The terms "licensed health care practitioner"

and "practitioner" mean, with respect to a State, an individual (other than a physician) who is licensed or otherwise authorized by the State to provide health care services.

(7) The term "medical malpractice action or claim" means a written claim or demand for payment based on a health care provider's furnishing (or failure to furnish) health care services, and includes the filing of a cause of action, based on the law of tort, brought in any court of any State (or the United States seeking monetary damages.

(8) The term "physician" means a doctor of medicine or osteopathy or a doctor of dental surgery or medical dentistry legally authorized to practice medicine and surgery or dentistry by a State (or any individual who, without authority holds himself or herself out to be so authorized).

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence of professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous

sentence and also includes professional review activities relating to a professional review action. In this title, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on—

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

(10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician—

(A) to determine whether the physician may have clinical privileges with respect to, or

membership in, the entity,

(B) to determine the scope or conditions of such privileges or membership, or

(C) to change or modify such privileges or membership.

(11) The term "professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of a medical staff of such an entity when assisting the governing body in a professional review activity.

(12) The term "Secretary" means the Secretary of Health and Human Services.

(13) The term "State" means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

(14) The term "State licensing board" means, with respect to a physician or health care provider in a State, the agency of the State which is primarily responsible for the licensing of the physician or provider to furnish health care services.

§11152. Reports and memoranda of understanding

(a) Annual reports to Congress. The Secretary shall report to Congress, annually during the three years after the date of the enactment of this Act, on the implementation of this title [42 USCS §§11101 et seq.]

(b) Memoranda of understanding. The Secretary of

Health and Human Services shall seek to enter into memoranda of understanding with the Secretary of Defense and the Administrator of Veterans' Affairs to apply the provisions of part B of this title [42 USCS §§11131 et seq.] to hospitals and other facilities and health care providers under the jurisdiction of the Secretary or Administrator, respectively. The Secretary shall report to Congress, not later than two years after the date of the enactment of this Act [enacted Nov. 14, 1986], on any such memoranda and on the cooperation among such officials in establishing such memoranda.

(c) Memoranda of understanding with drug enforcement administrators. The Secretary of Health and Human Services shall seek to enter into a memorandum of understanding with the Administrator of Drug Enforcement relating to providing for the reporting by the Administrator to the Secretary of information respecting physicians and other practitioners whose registration to dispense controlled substances has been suspended or revoked under section 304 of the Controlled Substances Act. The Secretary shall report to Congress, not later than two years after the date of the enactment of this Act [enacted Nov. 14, 1984], on any such memorandum and on the cooperation between the Secretary and the Administrator in establishing such a memorandum.